Supreme Court, U.S.
FILED

①

94 999 DEC 5 1994

OFFICE OF THE CLERK

No. ___________

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Burns P. & Marjorie Downey, *Petitioner*,

v.

Commissioner of Internal Revenue, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Steven E. Reick
728 E. Calhoun St.
Woodstock, Il. 60098
(815) 338-8425
Counsel for Petitioner

October, 1994

103 pp

QUESTION PRESENTED

Whether damages received in settlement of litigation under the Age Discrimination in Employment Act of 1967 are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received *** on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 3
Reasons for granting the petition 5
Conclusion 17
Appendix A 1a
Appendix B 35a
Appendix C 54a
Appendix D 55a
Appendix E 62a
Appendix F 63a
Appendix G 65a

TABLE OF AUTHORITIES

Cases:

Abrams v. Lightolier, 841 F.Supp. 584 (D.N.J. 1994) 7
Bennett v. United States, 30 Fed. Cl. 396 (1994) 7
Coston v. Plitt Theatres, Inc., 831 F2d 1321 (7th Cir., 1987) 14
Espinueva v. Garrett, 895 F2d 1164 (7th Cir., 1985) 11
Graefenhain v. Pabst Brewing Co., 870 F2d 1198, (7th Cir., 1989) 14
Hawkins v. United States, 30 F3d 1077 (9th Cir., 1994) 17
Horton v. Commissioner, 33 F3d 625 (6th Cir., 1994) 17
Jay v. International Salt Co. 868 F2d 179 (5th Cir., 1989) 8
Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975) 10

Cases-Continued:

Page

Kossman v. Calumet County, 800 F2d 697 (7th Cir., 1986) 14

McCann v. Texas City Refining, Inc., 984 F2d 667 (5th Cir., 1993) 8

Pfeiffer v. Essex Wire Corp, 682 F2d 684 (7th Cir., 1982) cert. denied 479 U.S. 1039 (1982) 7, 15

Powers v. Grinnell Corp., 915 F2d 34 (1st Cir., 1990) 12, 13

Purcell v. Seguin State Bank & Trust Co., 999 F2d 950 (5th Cir., 1993) 5, 6, 8

Rex Trailer Co. v. United States, 350 U.S. 148 (1956) ... 14

Rickel v. Commissioner, 900 F2d 655 (3rd Cir., 1990). 10, 11

Schleier v. Commissioner, No. 93-5555, (5th Circuit, June 21, 1994) cert. granted Nov. 14, 1994, No. 94-500 .... 5, 7, 8

Schmitz v. Commissoner, 34 F3d 790 (9th Cir., 1994) 5, 6, 7

Shager v. Upjohn Company and Asgrow Seed Company, 913 F2d 398 (7th Cir., 1990) 8

Spicer v. Chicago Bd. of Options Exchange, Inc. 977 F2d 255 (7th Cir., 1992) 15

Trans World Airlines v. Thurston, 469 U.S. 111 (1985) 13

United States v. Burke, 112 S.Ct. 1867 (1992) 4, 6, 9, 10

Statutes and regulation:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*:
  29 U.S.C. 623(a)(1) 3
  29 U.S.C. 626(b) 3

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq* 7, 9, 11

Statutes and regulations-Continued:

Page

Internal Revenue Code (26 U.S.C.):

§104(a)(2) .... *passim*

§6512(b) 4

Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §7641(a), 103 Stat. 2379 17

14 C.F.R. §121.383(c) 3

Miscellaneous:

Ballentine's Law Dictionary (3rd Edition, 1969) 12

Black's Law Dictionary (6th Edition, 1990) 12

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. *reprinted in* U.S. Code Cong. & Admin. News 13, 16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Burns P. & Marjorie Downey, *Petitioner*,

v.

Commissioner of Internal Revenue, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Burns P. Downey and Marjorie P. Downey respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 51a) is reported at 33 F3d 836. The opinions of the United States Tax Court are reported at 97 T.C. 150 (1991) (App. *infra*, 1a) and at100 T.C. 634 (1993) (App. *infra*, 35a).

JURISDICTION

The court of appeals entered its judgment on August 30, 1994 Rehearing was denied on November 18, 1994. The jurisdiction of this Court is under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISION INVOLVED

1. Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a) provides in relevant part:

> "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived."

2. Section 104(a)(2) of the Internal Revenue Code of 1986, 26 U.S.C. §104(a)(2), provides, in relevant part:

> "Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include...
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness."

3. Section 1.104-1(c) of the Treasury Regulations, 26 C.F.R. 1.104-1(c), provides:

> "Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than by workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution."

STATEMENT

1. Burns P. Downey ("Taxpayer" or "Petitioner") was a pilot for United Airlines, Inc.[1] At the time the Petitioner turned age 60, FAA regulations required that all captains and first officers (co-pilots) stop flying in either capacity upon reaching age 60. 14 C.F.R. §121.383(c). No similar age restrictions existed for working as second officers (flight engineers) on any commercial aircraft. On the other hand, it was the policy of United to require that all flight deck officers retire, forcing all captains, first officers and second officers to cease working upon reaching age 60. United's policy did not allow captains and first officers who had reached age 60 from bidding for second officer positions, from which they would not be barred by FAA rules. Therefore, the Petitioner filed suit in federal district court alleging that his termination violated the Age Discrimination in Employment Act of 1967 ("ADEA"), which, among other things, makes it "unlawful for an employer...to discharge any individual...because of such individual's age" (29 U.S.C. 623(a)(1)). As a remedy for having suffered a violation of the statute, the ADEA allows for reinstatement, back pay, injunctive and declaratory relief and attorney's fees, and, in the case of a willful violation of the act, the plaintiff can recover an award of "liquidated damages equal to the backpay award granted. (*See*: 29 U.S.C. 626(b)). Petitioner's suit was consolidated in a class action, and on December 27, 1985, the Petitioner's case was settled. At the insistence of United, the settlement provided for a bifurcation of the settlement award into two equal parts, one labeled as "nonliquidated damages" and the other to be treated as "liquidated damages". Taxes were withheld on the nonliquidated portion and a Form W-2 was issued, and United reported the liquidated portion on a Form 1099. (Tax Ct. Pet'n. p.1)

---

[1] Petitioner's wife Marjorie is a party to this case because she filed a joint income tax return with the Petitioner for the year in question.

The Petitioner reported the nonliquidated portion of the recovery on his 1985 income tax return, and omitted the liquidated portion. The Commissioner of Internal Revenue filed a notice of deficiency to the Petitioner, asserting that the liquidated damages were taxable income, and denying a deduction for attorney's fees paid in the case[2] resulting in a deficiency of $43,237 in the Petitioner's income tax for 1985 (Tax Ct. Pet'n p. 1)

2. The Petitioner brought this action seeking redetermination of deficiencies asserted by the Commissioner, the sole issue being whether the damages awarded were properly excluded under Section 104(a)(2). The initial petition did not seek exclusion of the nonliquidated portion upon which taxes had been paid, but the Tax Court allowed the filing of an amended petition requesting a determination of overpayment from having paid tax on the nonliquidated portion. (*See*: 26 U.S.C. 6512(b))

The case was submitted fully stipulated to the Tax Court. In a reviewed decision, the Tax Court issued its opinion that the entire settlement was excludable from income under Section 104(a)(2). (*Downey v. Commissioner* 97 T.C. 150 (1991) (*Downey I*)) The court determined that the damages, regardless of how they are classified in a settlement agreement, are excludable as having been recovered pursuant to a tort or tort-like claim to redress a personal injury. The court reasoned that the nonliquidated portion, classified as backpay in the settlement agreement, compensates an ADEA claimant for pecuniary losses arising from age discrimination, and the liquidated damages compensate the claimant for certain nonpecuniary losses and personal injuries arising from age discrimination which are too difficult to adequately measure. Prior to entering its decision in the case, the Commissioner requested that the Tax Court reconsider its opinion in light of the Supreme Court's opinion in the case of *United States v. Burke*, 112 S. Ct. 1867 (1992). The Tax Court agreed, and issued a supplemental opinion on June 29,

---

[2] Other adjustments were asserted, which were agreed to and are not relevant to the issues presented in this case.

1993, reaffirming its original opinion in *Downey I*. (*Downey v. Commissioner* 100 T.C. 634 (1993). (*Downey II*)

3. The Seventh Circuit noted that *Burke* requires that a federal antidiscrimination statute must provide "for intangible elements of personal injury (such as pain, suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax exempt treatment under §104(a)(2)" (App, *infra,* 59a). It then reversed the Tax Court, holding that both the nonliquidated and liquidated portions of the recovery were taxable, stating that neither portion of the recovery "compensate for the intangible elements of a personal injury" (App., *infra,* 61a).

4. In appeals involving other plaintiffs in the original class action against United, the Fifth and Ninth Circuits affirmed the Tax Court decision in *Downey*. *Schleier v. Commissioner*, No. 93-5555, (5th Cir., June 21, 1994) (App., *infra*, 63a)[3]; *Schmitz v. Commissioner*, 34 F3d 790 (9th Cir., 1994) (App. *infra*, 65a).

In *Schleier*, the Fifth Circuit adopted the Tax Court's decision in *Downey* in ruling on a damages question in a non-tax ADEA case. *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950 (1993)[4] In *Schmitz*, the Ninth Circuit ruled that the award of liquidated damages distinguished ADEA from the statute in question in *Burke*, and that the availability of jury trials in ADEA actions was also dispositive. In answer to the Commissioner's contention that ADEA liquidated damages are punitive, the court stated that such damages are designed "to compensate victims for damages which are too obscure and difficult to prove" (App., *infra*, 72a).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for the following reasons: (1) the Ninth Circuit Court of Appeals recently issued its opinion in *Schmitz v. Commissioner,* 34 F3d 790 (9th Cir., 1994), (App. *infra*, 65a) where, on a fact situation identical to the instant case, the court found that all amounts received by an ADEA plaintiff are excludable from income under Section 104(a)(2)). In addition, the Fifth Circuit, which adopts the Seventh Circuit's approach to prejudgment interest, has concluded that ADEA damages are exempt under Section 104(a)(2)[5]; (2) the Seventh Circuit has misinterpreted of the decision of this Court's opinion in *United States v. Burke*, 112 S. Ct. 1867 (1992), and (3) the Seventh Circuit's past treatment of ADEA dam-ages can only support a finding consistent with the Tax Court's decision in *Downey II*, based upon the test required by *Burke*.

---

[3] On November 14, 1994, this Court granted certiorari in this case (Docket No. 94-500).

[4] The court in *Purcell* declined to add an amount equal to income taxes to an ADEA award because the award would be non-taxable pursuant to *Downey*.

The tax treatment of damages received under ADEA, as well as under other antidiscrimination statutes, is a recurring question of exceptional administrative importance, in that the decision rendered in this case will have an impact on hundreds of cases which have been brought under these statutes.

1. Review in this case is necessitated because, on the same date that the *Downey* court issued its opinion, the Ninth Circuit Court of Appeals issued its opinion in *Schmitz v. Commissioner,* 34 F3d 790 (9th Cir., 1994). In *Schmitz*, a case involving a taxpayer similarly situated to the present case, the court upheld the Tax Court's findings that all damages received in an ADEA action are excludable under Section 104(a)(2), giving rise to a 180° divergence of position between the circuits. The court examined the same arguments as were made in this case, and found that the ADEA, even in the post-*Burke* world, provided damages which were broad enough to satisfy the *Burke* test, noting that the Fifth Circuit, the Court of Federal Claims and the Tax Court have all examined the issue of ADEA damages after *Burke*, and have concluded that they satisfy the more rigorous test contained therein (*see, e.g., Purcell v. Seguin State Bank & Trust Co.*, 999 F2d 950 (5th Cir., 1993), *Schleier v.*

---

[5] *Schleier v. Commissioner*, No. 93-5555 (5th Cir., June 21, 1994) cert granted, No. 94-500

Commissioner, No. 93-5555, (5th Cir., June 21, 1994) cert. granted, No. 94-500, (Nov. 14, 1994); *Bennett v. United States*, 30 Fed. Cl. 396 (1994) and the instant case; *cf. Abrams v. Lightolier*, 841 F. Supp. 584 (D.N.J. 1994).

The Ninth Circuit, unlike the Seventh, noted that in *Burke*, the Supreme Court "specifically relied on the unavailability of jury trials...in Title VII actions" (App. *infra*, 71a) to find that Title VII actions did not give rise to a tort-like conception of injury or remedy. In addition, the Court in *Schmitz* did not get sidetracked by terminology, noting that while "ADEA does not provide for nonpecuniary compensatory damages or punitive damages 'by name', it does provide for 'liquidated damages' in cases of willful discrimination". (App. *infra*, 69a) (internal citations omitted), noting that liquidated damages "serve to compensate the victim of age discrimination for certain nonpecuniary losses" (*ibid.*), quoting *Downey II*, 100 T.C. at 637.

In response to the government's argument that ADEA does not provide for damages for emotional distress or pain and suffering, and that liquidated damages are punitive in nature, the *Schmitz* court noted that the "case law and legislative history indicate that ADEA liquidated damages serve a compensatory as well as a punitive purpose." and stated that "*Burke* does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort-type right", concluding that "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from Title VII. Moreover, even if ADEA liquidated damages have a punitive purpose, such a purpose appears more tort-like than contract-like." (App. *infra*, 70a) (internal citation omitted). The court went on to state that "the mere fact that liquidated damages are available in cases of 'willful' discrimination does not transform them into punitive damages or eliminate their compensatory purpose...[I]n enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect business from crushing liability." (App. *infra*, 74a) (*accord*, *Pfeiffer v. Essex Wire Corp.* 682 F2d 684, 687 (7th Cir. 1982)).

In addition, while the Seventh Circuit attempts to shoehorn the liquidated damages provisions of ADEA into a manner of contractual relief, the Ninth Circuit rejects that argument by stating that contract rights "arise from the parties' private-law relationship; each litigant's rights and duties depend primarily on the terms of their agreement." (App. *infra*, 70a) ADEA liability, as in the case of other torts, arises as a result of the "violation of some duty owing to the plaintiff....generally [arising] by operation of law and not by mere agreement of the parties" (*ibid.*), quoting *Downey I*, 97 T.C. at 160 (quoting Black's Law Dictionary, 1489 (6th ed. 1990).

Finally, while the Fifth Circuit adopts the Seventh Circuit's approach to prejudgment interest, and does not allow for the granting of prejudgment interest in cases where liquidated damages are awarded (*McCann v. Texas City Refining, Inc.* 984 F2d 667 (5th Cir., 1993)), it has also held that both nonliquidated and liquidated damages awarded in ADEA actions are excludable under Section 104(a)(2) (*see, e.g., Purcell v. Seguin State Bank & Trust Co.*, 999 F2d 950 (5th Cir., 1993); *Schleier v. Commissioner*, No. 93-5555 (5th Cir., June 21, 1994) cert. granted, No. 94-500, Nov. 14, 1994). The Seventh Circuit fails, however, to explain the rationale for arriving at a different conclusion for the treatment of these damages with a circuit which adopts in full the Seventh Circuit's rationale regarding prejudgment interest. The court indicates that *Burke* is a watershed event in the analysis of damages awarded in discrimination cases, and yet does not address *Schleier*, the first post-*Burke* opinion addressing this matter.

In both the Fifth and the Ninth Circuits, the courts properly looked to their own law to see if ADEA had been given a tort-like analysis in other contexts. In *Purcell*, the Fifth Circuit noted that in *Jay v. International Salt Co.*, 868 F2d 179 (5th Cir., 1989), the ADEA is a tort claim for purposes of calculating the statute of limitations. The Seventh Circuit has done the same, in *Shager v. Upjohn Company and Asgrow Seed Company*, 913 F2d 398, 404 (7th Cir., 1990) where the court found that the doctrine of respondeat superior extends liability to a corporation for the intentional tort, in this case, age discrimination, of its agent. However, in this case, this method of analysis is not discussed.

2. Review is further necessitated because the Seventh Circuit, in its opinion reversing the Tax Court, has misinterpreted this Court's decision in *United States v. Burke*, 112 S.Ct. 1867 (1992) as providing the rationale for finding that ADEA damages are not excludable under Section 104(a)(2). The court has erred by not giving full attention to what the *Burke* decision actually says, and the analysis which it calls for in the interpretation of anti-discrimination statutes as they relate to Section 104(a)(2).

Burke does not say that, as the sole basis for qualification for the exclusion, the statute "must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress or personal humiliation) to constitute a tort-type personal injury and receive tax exempt treatment under §104(a)(2)" (App. *infra*, 59a). *Burke* provides a much broader test than that, one which Title VII did not pass, one which ADEA does pass, and one which the Seventh Circuit misinterpreted

First of all, the *Burke* decision mentions no fewer than 3 times in as many pages that the lack of a jury trial was a clear area of distinction and a strong reason for saying that Title VII does not sound in tort. The Seventh Circuit makes no mention at all of the availability of a jury trial in ADEA actions, and to this extent, *Downey* is in conflict with *Burke*.

Second, *Burke* paints the types of damages which characterize tort recoveries with a broader brush than either the government, or the *Downey* court, wishes to accept. This Court in *Burke* distinguished Title VII from tort remedies for physical and non-physical injuries by stating that "Title VII does not allow awards for compensatory **or** punitive damages; instead it limits available remedies to backpay, injunctions, and other equitable relief." 112 S. Ct. 1867, 1873 (1992) (emphasis provided). The Seventh Circuit's insistence upon statutory language specifically allowing for the award of compensatory damages such as pain and suffering ignores the distinction drawn in *Burke* between Title VII and 42 U.S.C. §1981, which "permits victims of race based employment discrimination to obtain a jury trial at which 'both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded'" 112 S.Ct. 1867, 1873-1874 (1992), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). It is, therefore, clear that *Burke* is not looking for a limited definition of the harm suffered by a victim of discrimination before finding that the statute under which the plaintiff sues sounds in tort. The above language would indicate that a statute which provides for the awarding of punitive damages alone could provide sufficient damages for the recovery to qualify for exclusion under Section 104(a)(2).

Also, this Court, in its discussion of dignitary or nonphysical torts and the types of damages available to plaintiffs, cites *Rickel v. Commissioner*, 900 F2d 655 (3rd Cir. 1990) as an example of the very type of non-physical invasion of rights which it sees as having the requisite attributes of injury and remedy to distinguish other non-physical injuries from Title VII by stating:

> "...the courts and the IRS long since have recognized that section 104(a)(2)'s reference to 'personal injuries' encompasses, in accord with common judicial parlance and conceptions, nonphysical injuries to the individual, such as those affecting emotions, reputation, or character, as well. See, *e.g. Rickel v. Commissioner*..." 112 S.Ct. at 1871, footnote 6 (internal citations omitted)

It is unlikely that, with all of the cases to date which have construed section 104(a)(2) on fact situations involving the types of harm which the government insists must be available to gain the exclusion, this Court would have selected the latest case at that time involving the very statute which the *Downey* court was asked to interpret, unless it meant to send a clear message that *Rickel* is still good law.

Burke, then, can be interpreted to stand for the following: that where a dignitary harm is suffered, for which an action at law is available, if the statute under which the plaintiff sues provides for damages beyond those which return the plaintiff to the economic position which he would enjoy absent the defendant's action, whether those damages are granted in the individual case or not, then the statute provides remedies which are sufficiently broad so as to evidence a tort-like conception of injury, with the result that all damages received under it will qualify for the exclusion under section 104(a)(2). To find otherwise would reduce a court to the point of "rummaging through the taxpayer's prayers for relief in order to determine the nature of his claim" (*Rickel v. Commissioner*, 900 F2d 655 at 661 (3rd Cir. 1990)), a direct contradiction to the ruling in *Burke*.[6] As the Ninth Circuit states in *Schmitz*, "exactly what injuries ADEA liquidated [damages] redress will inevitably vary from case to case;...ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of injuries...Because each employee's injuries differ-in ways that cannot be calculated-we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive." (App. *infra*, 75a, *fn* 28)

---

[6] Liquidated damages are not available in ADEA actions to federal employees. *Espinueva v. Garrett*, 895 F2d 1164, 1165 (7th Cir., 1985) The government has argued that this makes the ADEA remedial scheme for federal employees identical to pre-1991 Title VII recoveries, and that the only way to ensure identical tax treatment for federal and non-federal plaintiffs is to find that ADEA damages are not excludable. This misses the point of *Burke*, in that if the statute provides for damages which are broad enough to pass the test for exclusion, the nature of the plaintiff's employment, the contractual relationship between the plaintiff and defendant, and the scope of damages awarded are all irrelevant.

3. Finally, certiorari should be granted because the Seventh Circuit does not appear to be adhering to its own definition of what ADEA liquidated damages represent, by moving from the position that prejudgment interest may not be awarded in cases where liquidated damages are awarded to stating that "ADEA liquidated damages replace prejudgment interest" (App. *infra*, 60a), giving the impression that liquidated damages consist of prejudgment interest and nothing else. The court's interpretation of *Powers v. Grinnell Corp.* 915 F2d 34 (1st Cir., 1990) as standing for the proposition that ADEA liquidated damages replace prejudgment interest ignores the fact that the First Circuit has "never held that the *only* function served by liquidated damages is to compensate for loss due to delay in payment" 915 F2d at 42.

As in *Schmitz*, the government in this case asserts that liquidated damages in an ADEA claim represent punitive damages, or represent prejudgment interest. Neither of these assertions conforms to the case law, both from this circuit and other courts, nor do they conform to the legislative history surrounding the 1978 amendments to the ADEA itself. The legislative history of the amendment states as follows:

> "[ADEA] liquidated damages (calculated as an amount equal to the pecuniary loss) [] compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.
>
> ...The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for

> estimate other than by liquidated damages.' *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-584 (1942)." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14 *reprinted in* U.S. Code Cong. & Admin News 528, 535

Nonpecuniary damages are defined as "(d)amages for injury of such nature that there is no money standard applicable in measurement of the amount of damages...since it not a matter of mathematical calculation, as illustrated in damages for pain, suffering and defamation." Ballentine's Law Dictionary, (3rd Edition, 1969). Reading the above, nothing could more plainly state Congress' intention that liquidated damages serve one purpose only, to compensate a plaintiff for harm beyond that economic harm which he suffered due to the ADEA violation, and that the damages are not punitive in nature. In fact, it could possibly be argued that ADEA liquidated damages are actually more akin to statutory damages, which "result from statutorily created causes of action, as opposed to actions at common law, *e.g.* wrongful death and survival actions, actions under tort claims acts..." Blacks Law Dictionary, 392 (6th Edition, 1990) The assertion that liquidated damages are punitive, based upon the language in *Trans World Airlines v. Thurston*, 469 U.S. 111, 125 (1985) ("The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature.") was rejected by the First Circuit in *Powers v. Grinnell Corp.*, 915 F2d 34, 39-42 (1st Cir. 1990), which stated that:

> "the revisionist view reads far too much into the one sentence in *Thurston* upon which it relies. With its focus only on whether "willfulness" is essential to an award of liquidated damages, *Thurston* simply observes that liquidated damages serve a punitive function. *Thurston* did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve [a] compensatory function..." 915 F2d at 41

This Court's injunction in *Burke* to find a broad range of damages in order to conclude that a statute sounds in tort, along with the language of the legislative history above, should be dispositive. The Seventh Circuit has addressed the fact that liquidated damages provide compensation for a broader range of damages than just prejudgment interest, by stating that "liquidated damages under the ADEA in part account for harm otherwise difficult to calculate..." *Coston v. Plitt Theatres, Inc.* 831 F2d 1321 (7th Cir. 1987), vacated on other grounds, 486 U.S. 1020 (1988), on remand, 860 F2d 834 (7th Cir. 1988). The Court has also stated that "liquidated damages under the ADEA...are intended to provide compensation for losses that cannot be calculated with certainty" *Kossman v. Calumet County*, 800 F2d 697, 702 (7th Cir., 1986). It has also held that liquidated damages have a punitive character, but in examining the above cases, concluded that "Congress also intended liquidated damages to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct," and that "liquidated damages...may be [a] compensatory measure. *Graefenhain v. Pabst Brewing Co.* 870 F2d 1198, 1205 (7th Cir., 1989). Therefore, from this line of cases, one can only draw the conclusion that the Seventh Circuit has long seen ADEA liquidated damages as something far greater than being solely a substitute for prejudgment interest. The court's reliance on the case of *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956) as providing the support for ADEA liquidated damages being contractual in nature is misplaced, *Rex Trailer* was a case interpreting the Surplus Property Act of 1944 (58 Stat. 765), not an antidiscrimination statute such as ADEA.

Common sense would indicate that if anything can be calculated with certainty under ADEA, it is prejudgment interest. All of the essential elements for computation are available: (1) the amount of nonliquidated damages, (2) the time which has lapsed since between the onset of the discriminatory practice and payment, and (3) an interest rate which can be determined by the parties or by the court. Thus, the legacy of case law and legislative history which speaks in terms of damages which are "too obscure and difficult of proof for estimate" cannot be reconciled with the position that liquidated damages are meant to replace prejudgment interest. The measure of nonpecuniary damages is too ambiguous, prejudgment interest is too certain of determination. As the Seventh Circuit has stated: "Words are ambiguous enough, *see, e.g., United States v. Burke*, ...and the greater the ambiguity, the more potentially free and unfettered the interpretation" *Spicer v. Chicago Bd. of Options Exchange, Inc.* 977 F2d 255 (7th Cir., 1992) (internal citation omitted).

The Seventh Circuit's practice is not to allow an award of prejudgment interest in ADEA cases where there is a finding of willfullness on the part of the defendant. *Pfeiffer v. Essex Wire Corp.*, 682 F2d 684, 687 (7th Cir., 1982), cert denied, 479 U.S. 1039 (1982). However, in *Pfeiffer*, the court's language indicates that liquidated damages serve to compensate for a much broader scope of harm than just delay in payment. The court stated as follows:

> "When the ADEA was formulated by Congress, several alternatives were considered. The version ultimately adopted, as proposed by Senator Javits, eschewed various schemes of enforcement in favor of selective adoption of the FLSA enforcement provisions.***
>
> No provision was made for compensatory or punitive damages, and courts have universally struck down request for such damages...Congress can be presumed to have had the knowledge of the interpretation given the FLSA when it enacted the ADEA, and if it intended punitive and pain and suffering damages to be obtainable under the ADEA, *that availability must be the result of the selective changes made in the remedial provisions of the FLSA to obtain the final version of the ADEA*." 682 F2d at 686 (7th Cir., 1982) (internal citations omitted, emphasis added)

The court went on to note that three changes were made to the FLSA remedial scheme to come up with the ADEA scheme. The first two, the elimination of criminal penalties and the limitation on the availability of liquidated damages were seen as a way to limit the scope of available remedies, and thus effect the administrative conciliation scheme of the statute. (*see, Schmitz* App. *infra*, 68a) The third change, the provision for other legal or equitable relief to carry out the purposes of the statute, has been held not to be a way in which to award pain and suffering damages in addition to the award of liquidated damages. The court then turned to the legislative history of the 1978 amendments to the ADEA, and examined the statement that liquidated damages were meant "to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages'" 682 F2d at 687, citing H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14 *reprinted in* U.S. Code Cong. & Admin News 528, 535, and concluded by saying that:

> "Therefore, in light of the language of the Act, the statutory context, and the legislative purpose as expressed in the remedial scheme and legislative history, we find...that punitive damages and damages for pain and suffering are not available under the ADEA."

Reading the above quote in context with the discussion by the court of the selective changes made to the FLSA remedial scheme to arrive at the remedial scheme of ADEA, one sees that the court actually meant that such pain and suffering damages, among others, are bound up in an award of liquidated damages, and that to award them on their own would be to duplicate them, thereby impeding the other aims which the Act sought to effectuate. A limitation on the amount of damages to be awarded does not detract from the nature of the damages actually awarded.

The court appears to assume that punitive damages awarded in tort situations are taxable, and that a finding that ADEA liquidated damages are punitive would make them ineligible for the exclusion. No authority appears to exist in the Seventh Circuit as to the taxability of punitive damages in such cases. As it is, this is an area where it appears conflict may exist among the circuits (*compare: Hawkins v. United States*, 30 F3d 1077 (9th Cir., 1994) and *Horton v. Commissioner*, 33 F3d 625 (6th Cir., 1994).[7]

This case is of exceptional administrative importance because the question of whether ADEA damages are excludable has recurring significance, and the diversity of opinion among the circuits gives rise to confusion, and results in a form of "domicile lottery." Review of this case is necessary to ensure uniformity of tax treatment of ADEA damages.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.
Steven E. Reick
Attorney for Petitioners

November, 1994

---

[7] Congress amended Section 104(a)(2) in 1989 to provide that the exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §7641(a), 103 Stat. 2379. It is the position of petitioner that the manner in which the amendment is drafted indicates that tort damages received prior to the amendment for non-physical as well as physical torts qualify for the exclusion. Therefore, a finding that liquidated damages in this case are punitive in nature should not be fatal to a finding of exclusion under §104(a)(2)

APPENDIX A

United States Tax Court

97 T.C. No. 10
Docket No. 11120-89

Burns P. Downey and Marjorie Downey, *Petitioners*

v.

Commissioner of Internal Revenue, *Respondent*

Filed July 31, 1991

P, an airline pilot, sued his former employer under the Age Discrimination in Employment Act of 1967 (ADEA) claiming that certain actions of his employer constituted unlawful age discrimination in violation of the ADEA and that such actions were a willful violation of the ADEA. P received the amount of $120,000 in settlement of his ADEA claim. One-half of the settlement amount was allocated to "nonliquidated damages," and one-half to "liquidated damages." *Held*, under sec. 104(a)(2), an ADEA claim is a tort or tort-like claim to redress a personal injury. *Held further*, we overrule in part our decision in *Rickel v. Commissioner* 92 T.C. 510 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990), and we overrule our decision in *Pistillo v. Commissioner* T.C. Memo. 1989-329, *revd.* 912 F.2d 145 (6th Cir. 1990). *Held further*, nonliquidated damages, or back pay, under the ADEA compensate the victim for pecuniary losses arising from age discrimination. *Held further*, liquidated damages under the ADEA compensate such victim for certain nonpecuniary losses arising from age discrimination. *Held further*, petitioners, accordingly, are entitled under sec. 104(a)(2) to exclude from gross income the nonliquidated and the liquidated damages received in settlement of the ADEA claim.

Steven E. Reick, 728 E. Calhoun St., Woodstock, Ill., for the petitioners.

Marjory A. Gilbert, James F. Hanley, Jr., and Jan E. Lamartine, for the respondent.

Opinion

Halpern, *Judge*:[1] Respondent has determined a deficiency of $43,237[2] in petitioners' Federal income tax for 1985, together with additions to tax under sections 6653(a) and 6661 (since conceded by respondent). This case requires us to determine the taxability of an amount received in settlement of a suit brought under the Age Discrimination in Employment Act of 1967, as amended (the ADEA). Pub.L. 90-202, 81 Stat. 602-608 (29 U.S.C. secs. 621-634). In their petition, petitioners assign error to respondent's determination that the portion of such amount received and categorized as liquidated damages constitutes gross income, subject to tax. By an amendment to their petition, petitioners assign error to their inclusion in gross income of the portion of the settlement amount categorized as nonliquidated damages. The question for our consideration is whether all or any portion of the settlement amount is excludable from gross income under section 104(a)(2). Section 104(a)(2) allows for the exclusion of "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness."

The parties have submitted this case fully stipulated, and the facts so stipulated are found accordingly. By this reference, the stipulation of facts and the attached exhibits are incorporated herein.

---

[1] By Order of the Chief Judge, this case was reassigned and submitted to Judge James S. Halpern for disposition.

[2] The parties have stipulated that respondent determined a deficiency of $42,237. Any inconsistency can be resolved in the Rule 155 computation. Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Background

Petitioners are husband and wife. At the time of filing their petition, petitioners resided in Oak Park, Illinois. When used in the singular, the term "petitioner" is intended to refer to petitioner husband, Burns P. Downey.

The Age Discrimination in Employment Act

As a preliminary matter, we will describe relevant aspects of the ADEA. The ADEA broadly prohibits arbitrary discrimination in the workplace based on age. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985). See 29 U.S.C. sec. 623(a).[3] The preamble to the ADEA declares that its purpose is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. sec. 621(b). Section 4(a)(1) of the ADEA proscribes differential treatment of workers between the ages of 40 and 70 "with respect to * * * compensation, terms, conditions, or privileges of employment." 29 U.S.C. secs. 623(a)(1), 631(a).

Section 7(b) of the ADEA provides that the rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act (the FLSA). See 29 U.S.C. sec. 626(b) (ADEA provision incorporating 29 U.S.C. secs. 211(b), 216(b), 216(c), and 217).[4]

---

[3] The ADEA (29 U.S.C. sec. 623(a)(1)) provides in part that:

It shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...

[4] See also Fair Labor Standards Act of 1938, Pub.L. 75-718, 52 Stat. 1060 (1938) (29 U.S.C. secs. 201-219).

The remedial provisions of the two statutes, though, are not identical.

Under the FLSA, employers who violate minimum wage or maximum hour laws are liable to the affected employees in the amount of their unpaid minimum wages, or their unpaid overtime compensation, and in an additional equal amount as liquidated damages. 29 U.S.C. sec. 216(b). Regarding liquidated damages, however, if the employer shows "that the act or omission giving rise to such action [for unpaid minimum wages or unpaid overtime compensation under the FLSA] was in good faith and that he had reasonable grounds for believing that his act or omission" did not violate the FLSA, the court may refuse to award liquidated damages. 29 U.S.C. sec. 260.

In contrast, section 7(b) of the ADEA provides that a prevailing plaintiff is entitled to liquidated damages "only in cases of willful violations." 29 U.S.C. sec. 626(b). Of course, as under the FLSA, a plaintiff under the ADEA can recover other than liquidated damages. Section 7(b) empowers the courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. sec. 626(b). In contrast to "liquidated damages" awarded under section 7(b), we will refer to amounts received pursuant to the quoted grant of authority as "nonliquidated damages."

Petitioner's Employment History With United Air Lines, Inc.

Petitioner was born on September 19, 1921. In 1945, petitioner was employed by United Air Lines, Inc. (United), and, by early 1981, petitioner was a captain, flying Boeing 747 jets. Generally, United's flight deck crews included two pilots (i.e., captain and first officer) and a second officer.

To continue flying as a captain, petitioner was required to submit to two Federal Aviation Administration (FAA) physicals a year and to hold a specific FAA medical certificate. On September 1, 1981, the FAA revoked petitioner's medical certificate, and United placed petitioner on sick leave. Pursuant to United's sick leave policy, petitioner, utilizing accumulated sick leave, continued to draw his full salary.

On September 19, 1981, petitioner turned 60 years old. FAA rules barred persons over the age of 60 from serving as captains or first officers, but did not preclude such persons from serving as second officers (the Age 60 Rule). See 14 C.F.R. sec. 121.383(c). United, however, had a somewhat contrary policy. United prohibited persons over the age of 60 who had served as a captain from holding any position in the flight deck crew, including that of a second officer. Therefore, on October 1, 1981, the commencement of the first month after petitioner turned 60, United changed petitioner's status from sick leave to retired.

As of October 1, 1981, petitioner ceased earning his captain's salary of $10,182 per month and began receiving $5,454 a month in retirement benefits.

Upon placement in retirement status, petitioner "forfeited" the balance of his accumulated sick leave. Petitioner calculated that, if United had reassigned him to a position as a second officer, rather than retired him, he would have been entitled to approximately $89,794 of additional sick pay.

Petitioner's Suit Against United Air Lines, Inc.

In June 1984, petitioner filed a complaint under the ADEA against United. The complaint was filed in the U.S. District Court, Northern District of Illinois, Eastern Division. B. Price Downey v. United Air Lines, Inc., Docket No. 84 C 5534. Petitioner's complaint alleged that United's refusal to allow petitioner to serve as a second officer after petitioner turned 60 years old constituted unlawful age discrimination and that United's actions were a willful violation of the ADEA. Petitioner's complaint mentions no other grounds for bringing the lawsuit. As relief, petitioner sought in his complaint, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, back pay plus interest, and liquidated damages.

In September 1984, petitioner regained his FAA medical certificate. A month later, in October 1984, petitioner applied to be reinstated on a flight deck crew in a position other than captain or first officer. United rejected petitioner's application based on its policy that persons over 60 years of age who had served as a captain were prohibited from holding any position on the flight deck crew, including the position of second officer.

Later in 1984, petitioner's civil action against United was joined with two other ADEA cases also in the U.S. District Court, Northern District of Illinois, Eastern Division. *Monroe v. United Air Lines, Inc.* (Docket No. 79 C 360); *Higman v. United Air Lines, Inc.* (Docket No. 79 C 1572). *Monroe* and *Higman* were the lead cases in a class action suit filed against United prior to the filing of petitioner's complaint and were consolidated themselves for the purpose of trial. Before petitioner filed his 1984 complaint against United, the trial court entered judgment on jury verdicts in favor of the plaintiffs and against United in *Monroe* and *Higman*. On appeal, the U.S. Court of Appeals for the Seventh Circuit reversed and remanded the class action suit on the basis of erroneous jury instructions. *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 409 (7th Cir. 1984). The parties have stipulated that petitioner's 1984 complaint was filed after the trial court's judgment but before the Seventh Circuit's reversal and remand.

Settlement of ADEA Suit

In late 1985, petitioner and United entered into a settlement agreement (the Settlement Agreement). The parties have stipulated that petitioner and United reached a settlement after the Seventh Circuit's reversal and remand in *Monroe* and *Higman* but before the disposition of the remanded class action suit. Pursuant to the Settlement Agreement, petitioner, in consideration for the payment by United of $120,000, released United from all claims arising out of his employment relationship with United, whether or not asserted in the ADEA action.

The Settlement Agreement allocated one-half of United's payment of $120,000 to nonliquidated damages and one-half to liquidated damages. In settlement negotiations, United's counsel insisted on language allocating United's payment between nonliquidated and liquidated damages, and petitioner agreed to the allocation to obtain the settlement. The Settlement Agreement stated that the $60,000 attributable to nonliquidated damages would be subject to all tax withholdings and deductions as required by law.

Further, the Settlement Agreement specified that petitioner and United were to execute and file a stipulation to dismiss with prejudice the ADEA action and that the entry by the U.S. District Court of an order dismissing with prejudice the ADEA action was "a necessary condition precedent to any obligation by United to pay" petitioner the sum of $120,000. The recital clauses in the Settlement Agreement referred to petitioner's ADEA action, but did not cite any other claims against United.

Procedural History

On their Federal income tax return for 1985, petitioners included as gross income the sum of $60,000 attributable to nonliquidated damages but did not include the sum of $60,000 attributable to liquidated damages. Petitioners claimed under section 212 a deduction in the amount of $40,000 for "legal expenses incurred to recover back pay award."

Upon completion of his examination of petitioners' return, respondent determined that petitioners should have included the $60,000 attributable to liquidated damages and that no amount was deductible as legal fees.[5] As stated, petitioners have challenged respondent's determination that the $60,000 attributable to liquidated damages is includable in gross income and further have asserted that they also should have excluded from gross income the $60,000 attributable to nonliquidated damages.

---

[5] Respondent also determined that petitioners had omitted from income an unrelated fee of $2,566. Petitioners concede that adjustment.

The parties have stipulated that, if the Court determines that any portion of the $120,000 settlement amount is includable in petitioners' income for 1985, a proportionate part of the disallowed attorneys fees will be allowed as an itemized deduction. The parties have stipulated also that petitioners are not liable for additions to tax under section 6653(a) or 6661.

Discussion

I. Introduction

Neither the Internal Revenue Code nor the ADEA specifically addresses the taxability of amounts received on account of claims under the ADEA. Petitioners argue that such amounts, whether received as liquidated or nonliquidated damages, are excludable from gross income under section 104(a)(2), as damages received on account of personal injuries. In contrast, respondent argues that petitioner's receipt of an amount as nonliquidated damages was in settlement of a claim for back pay, not a claim for personal injuries, and that such amount is not excludable under section 104(a)(2). Respondent further argues that liquidated damages under the ADEA are equivalent to punitive damages and that, therefore, petitioner's receipt of liquidated damages should be treated as in settlement of a claim for punitive damages, which are not excludable under section 104(a)(2).

The parties do not dispute the allocation of the settlement amount into two equal portions, the characterization of those portions as representing, respectively, nonliquidated and liquidated damages under the ADEA (as we have used those terms), or the fact that petitioner received that settlement amount solely on account of his claim under the ADEA. We agree with the parties regarding those matters and find that petitioner received the settlement amount solely on account of his ADEA claim. Thus, we treat the question here as concerning the taxability of nonliquidated and liquidated damages under the ADEA.

II. The Exclusion from Gross Income of Damages Received on Account of Personal Injuries.

A. A Dispute as to the Scope of Section 104(a)(2)

The dispute between the parties is, in essence, a dispute over the scope of the exclusion from gross income for damages received on account of personal injuries or sickness now found in section 104(a)(2). Since the scope of that exclusion has been subject to a great deal of controversy in other cases, we will begin by exploring in some detail the history and interpretation of that exclusion.

B. History of the Exclusion

The exclusion for damages received on account of personal injuries or sickness first appeared in the tax statute in 1918. See Revenue Act of 1918, Pub. L. 65-254, ch. 18, sec. 213(b)(6), 40 Stat. 1057, 1065-1066.[6] Previously, the administrative position of the tax authorities had been that the proceeds of an accident insurance policy were not gains and thus not taxable as income on the theory that such proceeds represented a return of capital. 31 Op. Atty. Gen. 304, 308 (1918). On a similar theory, "an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident" was not considered income subject to taxation. T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918). Those administrative positions may have reflected too generous a view of what constitutes a return of capital (a return of capital arguably being beyond the constitutional power to tax income). Schlenger, "Disability Benefits Under Section 22(b)(5)," 40 Va. L. Rev. 549, 550-552 (1954).

---

[6] Section 213(b)(6) of the Revenue Act of 1918 excluded from gross income the following:

> Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness. Substantially identical language has appeared in each intervening revenue act and codification of the tax law.

The legislative history of the Revenue Act of 1918 suggests that Congress also was of the view that compensation received for, or damages received on account of, personal injuries or sickness was beyond the reach of the income tax. The relevant House report states that:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income. H. Rept. No. 767, 65th Cong., 2d Sess. 9-10 (1918), reprinted in 1939-1 C.B.(Part 2) 86, 92.

Likewise, judicial decisions of the period dealing with damages received on account of personal injuries reflect the view that such recoveries did not give rise to income. In *Hawkins v. Commissioner* [Dec. 2390], 6 B.T.A. 1023 (1927), the Board of Tax Appeals held that compensatory damages received for libel and slander were not taxable as income. The Board found that "Such compensation as general damages adds nothing to the individual, for the very concept which sanctions it prohibits that it shall include a profit. It is an attempt to make the plaintiff whole as before the injury." *Id.* at 1025. See *Clark v. Commissioner* 40 B.T.A. 333, 335 (1939) ("The theory of those cases [i.e., *Hawkins v. Commissioner, supra*, and several other earlier cases] is that recoupment on account of such losses is not income.").

We doubt whether the return of capital theory justifies the exclusion from income of the full range of damages found to be excludable under section 104(a)(2), particularly damages received in lieu of lost income. Perhaps, even originally, a more satisfactory justification for excluding a recovery for lost earnings as well as a recovery for pain and suffering may have been based on emotional and traditional, rather than logical, factors.[7] Whatever reasons initially motivated Congress to enact an exclusion for damages received on account of personal injuries or sickness, a contemporary inquiry must by necessity restrict itself to the language of section 104(a)(2), and administrative and judicial interpretations of that language.

C. The Nature of a Personal Injury

As used in section 104(a)(2), the term "personal injuries" has long been understood to include nonphysical injuries as well as physical injuries. See *Bent v. Commissioner* 87 T.C. 236 (1986), *affd.* 835 F.2d 67 (3d Cir. 1987) (deprivation of first amendment rights); *Church v. Commissioner* 80 T.C. 1104, 1106 (1983) (jury award of compensatory damages in a libel suit); *Seay v. Commissioner* 58 T.C. 32, 38 (1972) (compensation for personal embarrassment and injury to personal reputation). Moreover, courts have long held that injuries resulting from "invidious discrimination," whether on the basis of race, sex, or national origin, are injuries to the individual rights and dignity of the person and, thus, "personal injuries" for purposes of section 104(a)(2). *Burke v. United States* 929 F.2d 1119, 1121-1122 (6th Cir. 1991), and cases cited therein; *Metzger v. Commissioner* 88 T.C. 834, 848-849, 858 (1987), *affd. without published opinion* 845 F.2d 1013 (3d Cir. 1988) (sex and national origin discrimination). As such, the relevant distinction under section 104(a)(2) is between personal and nonpersonal injuries, not between physical and nonphysical injuries. *Roemer v. Commissioner* 716 F.2d 693, 697 (9th Cir. 1983), *revg.* 79 T.C. 398 (1982); *Threlkeld v. Commissioner* 87 T.C. 1294, 1300,

---

[7] See *Schlenger*, "Disability Benefits Under Section 22(b)(5)," 40 Va. L. Rev. 549, 550-552 (1954); *Harnett*, "Torts and Taxes," 27 N.Y.U. L. Rev. 614, 626-627 (1952); *Harrow*, "Exemptions under The Revenue Act of 1928," 10 Taxes 161, 163 (1932).

1305 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988) (compensatory damages received on account of an invasion of the rights that an individual is granted by virtue of being a person in the sight of the law).

D. Prosecution of a Tort (or at Least a Tort-Type) Claim

The exclusion in section 104(a)(2) is limited to "damages" received on account of personal injuries or sickness. The requirement for damages has been interpreted as requiring a lawsuit, or at least a settlement in lieu of a lawsuit. In particular, the relevant portion of the Income Tax Regulations, the validity of which neither party challenges, provides: "The term `damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." Sec. 1.104-1(c), Income Tax Regs.

Section 104(a)(2) excludes only damages received upon the prosecution of tort or tort-type claims, not damages received upon the prosecution of economic rights arising out of a contract. *Byrne v. Commissioner* 883 F.2d 211, 215 (3d Cir. 1989), *revg.* [Dec. 44,780] 90 T.C. 1000 (1988); *Metzger v. Commissioner* 88 T.C. 834, 848-850, 858 (1987), *affd. without opinion* 845 F.2d 1013 (3d Cir. 1988). Thus, the essential element of the exclusion under section 104(a)(2) is that the damages must derive from some sort of tort or tort-type claim against the payor. *Glynn v. Commissioner* 76 T.C. 116, 119 (1981), *affd. without published opinion* 676 F.2d 682 (1st Cir. 1982). The term tort has been defined as "[a] legal wrong committed upon the person or property independent of contract" or "a violation of some duty owing to plaintiff, ...generally...[arising] by operation of law and not by mere agreement of the parties." Black's Law Dictionary, 1489 (6th ed. 1990). See Restatement, Torts 2d, secs. 4 (defining "duty"), 7(1) (defining "injury" as "the invasion of any legally protected interest of another") (1965). The duty, the violation of which gives rise to a tort claim, can arise by statute. See *Byrne v. Commissioner*, supra at 215 (duty not to discriminate in certain situations arising out of the FLSA); *Metzger v. Commissioner*, *supra* at 845, 848-849 (duty not to discriminate on the basis of sex or national origin arising out of Federal and State statutes).

E. Settlements

Section 104(a)(2) contemplates that a lawsuit may be settled by agreement. Here, petitioner received the amount of $120,000 in settlement of his suit alleging that United discriminated against petitioner in violation of the ADEA. Where a settlement agreement exists, determining the exclusion from gross income depends on the nature of the claim that was the actual basis for settlement rather than the validity of such claim. *Threlkeld v. Commissioner* 87 T.C. at 1297; *Seay v. Commissioner* 58 T.C. 32, 37 (1972). In absence of express language stating whether the settlement amount was paid on account of personal injuries (or otherwise), the most important factor in determining any exclusion under section 104(a)(2) is "the intent of the payor" in making the payment. *Metzger v. Commissioner*, supra at 847-848; *Glynn v. Commissioner*, supra at 120.

F. Nature of Consequences of Tort Irrelevant

As suggested above, the inquiry under section 104(a)(2) is whether the nature of the claim giving rise to the payment is tort or tort-like and whether the nature of the injury is personal. *Burke v. United States* 929 F.2d 1119, 1121, 1123 (6th Cir. 1991). If the above two questions are answered in the affirmative, then our inquiry should end, and the settlement amount received on account of the personal injury is excludable from gross income under section 104(a)(2). *Burke v. United States* 929 F.2d at 1123; *Threlkeld v. Commissioner* 87 T.C. at 1299.

Although the direction of the necessary inquiry would seem straightforward, some confusion has arisen in the past when the focus has shifted from the source and character of the injury (a tortious invasion of personal rights) to its consequences. See *Roemer v. Commissioner* 716 F.2d 693, 696-697, 699 (9th Cir. 1983), *revg.* 79 T.C. 398 (1982). Those consequences are irrelevant for purposes of the inquiry required by section 104(a)(2). *Burke v. United States* 929 F.2d at 1123.

In *Roemer v. Commissioner* 79 T.C. 398 (1982), *revd.* 716 F.2d 693 (9th Cir. 1983), we were confronted by a jury's award of compensatory damages in a libel suit. We focused on the difference between injury to personal reputation and injury to business or professional reputation. We found that, since the taxpayer had failed to show that the compensatory damages derived from injury to personal reputation, those damages were not excludable under section 104(a)(2) for lack of a personal injury.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that no distinction between injuries to personal reputation and professional reputation was justified under section 104(a)(2). *Roemer v. Commissioner* 716 F.2d 693, 697 (9th Cir. 1983), *revg.* 79 T.C. 398 (1982). The Ninth Circuit found that, since the tort of defamation was a personal injury action under California law, the compensatory damages were excludable from gross income under section 104(a)(2). 716 F.2d at 700. The Ninth Circuit concluded that the distinction between injury to personal reputation and to professional reputation confused a personal injury (i.e., defamation of an individual) with its derivative consequences (i.e., loss of professional reputation and any resulting loss of income). *Id.* at 696-697, 699.

In *Bent v. Commissioner* 87 T.C. 236 (1986), *affd.* 835 F.2d 67 (3d Cir. 1987), we were confronted by an amount received in settlement of a lawsuit brought by a school teacher against his employer, the local public school board. We found that the school board paid the settlement amount based on the decision of the State trial court that the teacher's First Amendment right to freedom of speech had been abridged in violation of 42 U.S.C. section 1983 (section 1983). *Id.* at 245-246. We concluded that lost earnings should be included in determining the compensatory damages received for violations of section 1983 and held that the entire settlement payment was excludable from gross income under section 104(a)(2). In affirming our decision, the U.S. Court of Appeals for the Third Circuit emphasized that the derivative consequences of a personal injury, such as lost wages, were often the best measure of the extent of the personal injury suffered. *Bent v. Commissioner* 835 F.2d 67, 70 (3d Cir. 1987), *affg.* 87 T.C. 236 (1986).

In *Threlkeld v. Commissioner* 87 T.C. 1294 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988), we were confronted with facts that required us to reconsider our reasoning in *Roemer v. Commissioner* 79 T.C. 398 (1982), *revd.* 716 F.2d 693 (9th Cir.1983). In *Threlkeld*, we found that an amount specified in an agreement settling a malicious prosecution action as a recovery for injury to the taxpayer's professional reputation was excludable under section 104(a)(2). We held that we would no longer make the distinction we made in *Roemer v. Commissioner*, *supra*, between damages for injury to personal reputation and those for injury to professional reputation in determining whether damages received in a tort action are excludable from gross income under section 104(a)(2). *Threlkeld v. Commissioner* 87 T.C. at 1300, 1305. In *Threlkeld v. Commissioner*, supra at 1308, we concluded that:

> [W]e also recognize that focusing upon the nature of the taxpayer's injury instead of the nature of the consequences flowing from that injury will often be difficult. However, this is no more difficult in most cases than the type of inquiry previously required by the line of cases, culminating in Roemer, which distinguished the nature of the consequences resulting from a claim.

In affirming our decision, the U.S. Court of Appeals for the Sixth Circuit stated:

> We agree with the Ninth and the Third Circuits that the nonpersonal consequences of a personal injury, such as a loss of future income are often the most persuasive means of proving the extent of the injury that was suffered, and that the personal nature of an injury should not be defined by its effect. Injury to a person's hand or arm is a personal injury. This is so even though it may

> affect a person's professional pursuits. All income in compensation of that injury is excludable under section 104(a)(2). Similarly, the injury to taxpayer's reputation in this case was a personal injury. This is so even though it affected his professional pursuits. All income in compensation of that injury is excludable under section 104(a)(2). *Threlkeld v. Commissioner* 848 F.2d 81, 84 (6th Cir. 1988), *affg.* 87 T.C. 1294 (1986).

The above cases explain how the consequences of a personal injury, or the actual damages suffered, do not affect our inquiry under section 104(a)(2). Whether the damages paid to the tort victim reflect a substitute for amounts or items otherwise taxable or a substitute for amounts or items to be enjoyed without a tax consequence is irrelevant. Thus, section 104(a)(2) permits the exclusion of damages that are a substitute for the enjoyment of a whole body or of freedom from distress, such as damages for loss of limb or for pain and suffering. Likewise, the section allows the exclusion of damages that are a substitute for amounts or items that otherwise would be taxable or would potentially produce taxable benefit, such as income lost as a result of a personal injury or amounts reflecting injury to a person's business or professional reputation. *Burke v. United States* 929 F.2d 1119, 1123 (6th Cir. 1991) (lost wages); *Threlkeld v. Commissioner* 87 T.C. 1294 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988) (business or professional reputation). In sum, under section 104(a)(2), we will focus on whether the injury is personal and on whether the claim resulting in payment of damages is tort or tort-like, not on the consequences of the personal injury or the actual damages suffered.

G. The Inquiry at Hand

The inquiry at hand concerns the taxability of an amount received insettlement of a suit brought under the ADEA. There is no doubt that a lawsuit was brought under the ADEA and that petitioner received an amount in settlement of such suit. As we have stated, in his suit, petitioner alleged that United violated its duty under the ADEA not to discriminate on the basis of age. Accordingly, we look to the nature of the claim on which the suit was founded. *Metzger v. Commissioner* 88 T.C. at 847; *Threlkeld v. Commissioner* 87 T.C. at 1297; *Seay v. Commissioner* 58 T.C. 32, 37 (1972). We seek to determine whether petitioner's claim under the ADEA sounded in tort and whether the nature of the injury arising from age discrimination is personal for purposes of section 104(a)(2). See *Threlkeld v. Commissioner*, *supra* at 1299. If We answer those questions in the affirmative, then our inquiry has ended, and the payment petitioner received in settlement of the age discrimination claim is excludable under section 104(a)(2). *Id.* We need not consider the nature of the consequences of the personal injury (such as whether the victim suffered pain and suffering or was deprived of all or a portion of his livelihood). See *id.*

Regarding those questions, first, courts have held that discrimination claims are in the nature of tort or tort-type claims. *Byrne v. Commissioner* 883 F.2d 211, 215 (3d Cir. 1989), *revg.* 90 T.C. 1000 (1988). More specifically, age discrimination claims brought under the ADEA have been found to be in the nature of tort or tort-type claims. *Pistillo v. Commissioner* 912 F.2d 145, 149-150 (6th Cir. 1990), *revg.* T.C. Memo. 1989-329. Second, courts have held also that invidious discrimination, including age discrimination, in a personal injury for the purposes of section 104(a)(2). *Burke v. United States* 929 F.2d at 1121-1122; *Pistillo v. Commissioner*, *supra* at 150. We believe that those answers to those questions support exclusion of the whole of the settlement amount received by petitioner under section 104(a)(2), as damages received on account of personal injuries.

Since in the past we have distinguished between nonliquidated and liquidated damages received under the ADEA, we will focus separately on each of the two portions of the settlement amount.

III. Nonliquidated Damages under the ADEA

A. The Receipt in Question

Simply put, the ADEA prohibits discrimination in employment on the basis of age and accords victims of such discrimination the right to sue for relief. See 29 U.S.C. secs. 621(b), 623(a), 626(b), 626(c), 633. The courts are empowered to grant appropriate legal or equitable relief, including, among other relief, liquidated damages and damages for pecuniary losses. See 29 U.S.C. sec. 626(b). In the complaint petitioner filed against United, petitioner requested, as relief, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, and back pay plus interest. The one-half of the settlement amount allocated to nonliquidated damages is not further allocated among the items of requested relief. Since the parties seem to have so assumed, we will assume, without deciding, that the one-half of the settlement amount allocated to nonliquidated damages is fully allocable to back pay or other items that might otherwise be taxable if not received in settlement of a claim under the ADEA.

B. Positions of the Parties and our Previous Position

Petitioners argue that the portion of the settlement amount allocable to nonliquidated damages is excludable from gross income under section 104(a)(2) as damages received on account of personal injuries. Respondent counters that such nonliquidated damages were received on account of a wage claim against United and, thus, section 104(a)(2) does not apply, and the receipt is taxable. Although, on similar facts, previously, we have agreed with respondent, we no longer do so. We will explain our reasons below, but we first will review our previous position on the taxability of nonliquidated damages under the ADEA.

In *Rickel v. Commissioner* 92 T.C. 510 (1989), *affd. in part and revd. in part* 900 F.2d 655, 661-663 (3d Cir. 1990), we focused on the tax treatment of payments made to the taxpayer pursuant to an agreement settling an ADEA suit. The taxpayer had requested, among other relief, back wages and an equal sum as liquidated damages. We likened the damages received in lieu of wages to damages received in an action for breach of contract and, as such, held them nonexcludable under section 104(a)(2). *Id.* at 519-521. With regard to the liquidated damages, however, which were measured by that same lost income, we found such measure to be only a substitute for difficult to measure personal injuries resulting from discriminatory employment practices and held such recovery to be excludable under section 104(a)(2). *Id.* at 521-522.

On appeal, the U.S. Court of Appeals for the Third Circuit partially disagreed with our analysis and partially reversed our decision. *Rickel v. Commissioner* 900 F.2d 655 (3d Cir. 1990), *affg. in part and revg. in part* 92 T.C. 510 (1989). The Third Circuit reviewed only our holding that amounts received in lieu of wages under the ADEA were not excludable under section 104(a)(2) and explicitly refused to review our decision that the liquidated damages were excludable. 900 F.2d at 666 n. 18. According to the Third Circuit, after finding that age discrimination was similar to a personal injury and that an ADEA action constituted the assertion of a tort-type right, we should have ended our analysis there and found that all damages, including payment of back wages, flowing from the age discrimination were excludable under section 104(a)(4). Id. at 661. The Third Circuit suggested that "By going further and rummaging through the taxpayer's prayers for relief in order to determine the nature of his claim, [we were] simply defining the nature of the taxpayer's injury by reference to its nonpersonal consequences" (such as lost wages). *Id.* at 661-662.

In the Third Circuit's view, the ADEA gives rise to a duty on the part of employers to refrain from discriminating on the basis of age in certain situations. 900 F.2d at 662. The duty to refrain from age discrimination arises by operation of law and does not depend on any contractual relationship. *Id.* Generally, the Federal employment discrimination statutes were designed to go beyond the "mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g., refusal to hire contexts." *Id.* The nonpersonal consequences of discrimination, such as any loss of wages, does not transform discrimination into a nonpersonal injury. *Id.* at 663. In sum, the Third Circuit held that an ADEA suit was "analogous to the assertion of a tort-type right to redress a personal injury" and that, "just as in the case of a physical personal injury, all the damages received by the taxpayer on account of age discrimination are excludable under section 104(a)(2)." *Id.* at 663-664.

In *Pistillo v. Commissioner* 912 F.2d 145 (6th Cir. 1990), *revg.* T.C. Memo. 1989-329, the issue again was a payment made pursuant to an agreement settling an ADEA lawsuit. The U.S. Court of Appeals for the Sixth Circuit reviewed one of our memorandum decisions, which, like our decision in Rickel, held that a payment representing compensatory damages in lieu of back pay was not excludable under section 104(a)(2). Consistent with the Third Circuit in *Rickel*, the Sixth Circuit concluded that an age discrimination lawsuit was analogous to the assertion of a tort-type right to redress personal injuries and found that the entire settlement payment was excludable under section 104(a)(2). *Pistillo v. Commissioner* 912 F.2d at 149-150. The Sixth Circuit stated that the taxpayer's "loss of wages--a substantial nonpersonal consequence of his employer's age discrimination--did not transform the discrimination into a nonpersonal injury." *Id.* at 150. The Sixth Circuit noted that:

> Given the result we reach today, *Pistillo* will have less federal tax liability than if he had not suffered age discrimination in the first place. The reality, however, as opposed to the hypothetical, is that *Pistillo* did suffer invidious age discrimination. *Pistillo* endured his employer's indignities, insults and age discrimination, suffered a dignitary tort; and was personally injured...*Pistillo* is now entitled to receive federal tax treatment equal to that received by the typical tort victim who suffers a physical injury and, as a result, receives a settlement award. *Id.* at 150 (citations omitted).

C. We Overrule Our Decisions In *Rickel* (In Part) and *Pistillo*

The decisions of the Third and Sixth Circuits in, respectively, *Rickel* and *Pistillo* are not controlling here under *Golsen v. Commissioner* 54 T.C. 742, 756-757 (1970), *affd.* 445

F.2d 985 (10th Cir. 1971), because an appeal would lie to the Seventh Circuit, a circuit that has not yet considered the taxability of nonliquidated damages under the ADEA. Nevertheless, we are free to reject our decisions in *Rickel* and *Pistillo* and to follow the lead of the Third and Sixth Circuits in those cases, if we believe that we have good reason to do so. With that in mind, we have reviewed our decisions and the decisions of the Third and Sixth Circuits in *Rickel* and *Pistillo*. We do not lightly decline to follow our prior decisions; no court bound by the doctrine of stare decisis does. We believe, however, that the Third and the Sixth circuits have issued well reasoned decisions and that, in fact, those appellate decisions, and not our decisions in those cases, are more consistent with our decisions in *Metzger v. Commissioner* 88 T.C. 834, 845 (1987), *affd. without opinion* 845 F.2d 1013 (3d Cir. 1988) (sex and national origin discrimination), and *Threlkeld v. Commissioner* 87 T.C. 1294, 1297-1301 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988) (rejecting the bifurcation of defamation into injury to personal reputation and injury to professional reputation). In short, we no longer can distinguish age discrimination from sex discrimination and wages lost due to prohibited discrimination from income lost due to a defamed professional reputation. Therefore, we overrule our conclusion in *Rickel v. Commissioner* 92 T.C. 510 (1989), and *Pistillo v. Commissioner* T.C. Memo. 1989-329, that back pay or nonliquidated damages based on back pay received on account of a claim under the ADEA are not excludable under 104(a)(2).

In *Rickel v. Commissioner, supra* 92 T.C. at 518-520, we relied on *Metzger v. Commissioner, supra, Byrne v. Commissioner* 90 T.C. 1000 (1988), *revd.* 883 F.2d 211 (3d Cir. 1989), and *Thompson v. Commissioner* 89 T.C. 632 (1987), *affd.* 866 F.2d 709 (4th Cir. 1989). The first case, *Metzger v. Commissioner* 88 T.C. at 838, 845, 848-850, easily can be distinguished on its facts, because the agreement at issue there settled a breach of contract claim that existed independently of any discrimination claims. The second case, *Byrne v. Commissioner, supra*, was reversed on appeal. Finally, the third case, *Thompson v. Commissioner, supra*, dealt with a claim made under the Equal Pay Act of 1963, not the ADEA.[8] We need not today decide how we would proceed if we again faced facts similar to those in *Thompson*.

Respondent simply has confused the nature of petitioner's age discrimination claim with the derivative consequences of the personal injury and with the nature of the relief requested by petitioner in his ADEA complaint. Petitioner's claim against United arose not because United allegedly breached some contractual obligation to petitioner but because United allegedly breached its duty under the ADEA not to discriminate on the basis of age. United's duty under the ADEA not to discriminate does not depend on a contractual relationship with petitioner and includes hiring situations as well as promotion situations. See 29 U.S.C. sec. 623(a)(1). We recognize that petitioner's recovery here of lost wages is similar to a recovery petitioner might have received in settlement of a contract claim. The record, though, contains no evidence that petitioner had any separate contractual claim against United (such as a claim alleging that United breached an employment or collective bargaining contract with petitioner) requesting lost wages as relief; and we have found that petitioner received the amount at issue in settlement of the ADEA claim, not any other claim. Petitioners, thus, were entitled to exclude under section 104(a)(2) the nonliquidated damages received in settlement of the ADEA claim.

IV. Liquidated Damages Under the ADEA

A. The Issue, the Arguments, and Our Conclusion

We consider next whether section 104(a)(2) permits a taxpayer to exclude from gross income the portion of a payment allocated as liquidated damages in an agreement settling an ADEA civil action.

---

[8] See Equal Pay Act of 1963, Pub. L. 88-38, sec. 3, 77 Stat. 56-57 (1963) (29 U.S.C. sec. 206(d)).

Petitioner argues that that portion is excludable from gross income as damages received on account of personal injuries. Respondent counters that liquidated damages under the ADEA are equivalent to punitive damages and that section 104(a)(2) does not permit the exclusion of punitive damages. We note that respondent's argument depends initially on the proposition that liquidated damages paid under section 7(b) of the ADEA are paid to the ADEA plaintiff not to compensate the plaintiff for anything but rather to visit punishment on the defendant. If we find that such liquidated damages are equivalent to punitive damages, then we must either exclude the liquidated damages under *Miller v. Commissioner* 93 T.C. 330 (1989), *revd.* 914 F.2d 586 (4th Cir. 1990), or overrule our decision in *Miller*, as this case is not appealable to the Fourth Circuit. See *Golsen v. Commissioner* 54 T.C. 742, 756-757 (1970), *affd.* 445 F.2d 985 (10th Cir. 1971).

We conclude, however, that liquidated damages under the ADEA in the hands of the victim are intended to compensate the victim of age discrimination for certain nonpecuniary losses and, thus, are excludable from gross income under section 104(a)(2). *Rickel v. Commissioner* 92 T.C. 510, 521-522 (1989), *revd. on other grounds* 900 F.2d 655 (3d Cir. 1990). We need not consider in this case whether we should follow our decision or the decision of the Fourth Circuit in *Miller v. Commissioner*, *supra*, relating to whether punitive damages that serve no compensatory function are excludable under section 104(a)(2). Instead, we focus on the purpose under the ADEA of awarding liquidated damages to victims of age discrimination and, thus, on the compensatory nature of liquidated damages awarded under the ADEA.

B. Punitive Versus Compensatory Damages

Generally, punitive damages paid in a civil action based on tort are designed to punish the tortfeasor for the wrongful act and to deter the tortfeasor and others from similar acts in the future. Restatement, Torts 2d, secs. 901 (comment c), 908 (1979). The purposes of punitive damages are similar to those of fines in criminal law--namely, punishment and deterrence. In contrast to punitive damages, compensatory damages "are designed to place [the tort victim] in a position substantially equivalent in a pecuniary way to that which [the victim] would have occupied had no tort been committed." Restatement, *supra*, sec. 903 (comment a). Compensatory damages can include compensation for both nonpecuniary harms such as bodily harm, illness, physical pain, emotional distress, humiliation, and pain and suffering as well as pecuniary harms such as property damage and loss of past and prospective wages. Id. at secs. 903-906.

We recognize that the Supreme Court has stated that ADEA's legislative history "indicates that Congress intended for liquidated damages to be punitive in nature." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985). Respondent argues that this description suggests that liquidated damages under the ADEA are the equivalent of punitive damages and, thus, are not excludable under section 104(a)(2). We rejected that argument in *Rickel v. Commissioner* 92 T.C. at 521-522, and we again reject that argument. As we suggested in *Rickel v. Commissioner*, supra at 521, the Supreme Court in *Thurston* viewed liquidated damages as an effective deterrent to willful violations of the ADEA and was deciding the extent to which the employer's culpability affected liquidated damages. *Trans World Airlines, Inc. v. Thurston, supra* at 125-129. We do not believe the Supreme Court to have concluded that, from the recipient's perspective, receipt of liquidated damages under the ADEA represent anything other than compensation for those losses that are hard to calculate. See *Powers v. Grinnell Corp.*, 915 F.2d 34, 41 (1st Cir. 1990) ("We believe that the revisionist view reads far too much into the one sentence in Thurston upon which it relies."); *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 7 n. 9 (1st Cir. 1989).

We find support for our view of *Thurston* in the conclusion of several courts that liquidated damages serve both a compensatory and a deterrent or punitive function. In *Rickel v. Commissioner* 92 T.C. at 521, this Court noted that liquidated damages under the ADEA serve both a compensatory and a deterrent function. Several appellate courts also have recognized that such liquidated damages serve a compensatory and a deterrent function. See *Powers v. Grinnell Corp.*, *supra* at 41-43; *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("[W]hile liquidated damages serve a deterrent or punitive function, Congress also intended liquidated damages to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987) ("We agree that one purpose of a liquidated damage award is to compensate the plaintiff for the delay in receiving back pay and benefits. However, liquidated damages are also punitive in nature, intended to deter future violations.").

In addition, as we have discussed, the ADEA was modeled in part on the Fair Labor Standards Act of 1938, as amended (the FLSA). See, *e.g.*, 29 U.S.C. sec. 626(b) (ADEA provision incorporating 29 U.S.C. secs. 211(b), 216(b), 216(c) and 217). Regarding the ADEA, the Supreme Court has stated that, "where...Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). We note that liquidated damages under the FLSA have long been viewed as compensation for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583-584 (1942). We have found under both the ADEA and the FLSA that, from the victims' perspective, receipt of liquidated damages compensates victims for those difficult to measure nonpecuniary losses that are the consequence of the personal injury. *Rickel v. Commissioner*, *supra* 92 T.C. at 521.

> Finally, the legislative history of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (1978), supports the conclusion that, from the recipient's perspective, liquidated damages under the ADEA are intended to compensate the recipient for

> certain nonpecuniary losses. The Conference Report states that "The ADEA as amended by this act does not provide remedies of a punitive nature." H. Rept. 95-950, (Conf.) at 14 (1978) reprinted in 1978 U.S. Code Cong. & Admin. News 528, 535.

The Report states also that

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, `amounts owing' contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. H. Rept. 95-950, supra at 13. See *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687 (7th Cir. 1982).

C. Conclusion

In sum, we conclude that, from the victim's perspective, receipt of liquidated damages under the ADEA compensates the victim of age discrimination for certain nonpecuniary losses. *Rickel v. Commissioner* 92 T.C. at 521-522. We find that such liquidated damages are excludable under section 104(a)(2). *Id.* We, thus, hold that petitioners are entitled under section 104(a)(2) to exclude from gross income both the nonliquidated and the liquidated damages received in settlement of the ADEA claim.

Decision will be entered under Rule 155.

Reviewed by the Court.

Chabot, Körner, Swift, Gerber, Wright, Parr, Ruwe, Whalen, Colvin, and Beghe, *JJ.*, agree with the majority opinion. Hamblen, *J.*, did not participate in the consideration of this opinion.

Concurring and Dissenting Opinion

Cohen, *J.*

I agree with the majority opinion insofar as it holds that the amount received by petitioner as liquidated damages is excludable from taxable income under section 104(a)(2). I dissent, however, insofar as the majority holds that section 104(a)(2) also excludes from taxation amounts designated wages or back pay in the ADEA, in petitioner's complaint against his employer, in the settlement documents, on petitioner's tax return, and in the petition prior to amendment. The majority's use of the term "nonliquidated damages" (an anomalous term when applied to amounts actually calculated by reference to a wage schedule) is an understandable attempt to disregard labels in redetermining the substantive nature of the award. I submit, however, that the label given to these amounts by the Congress, by the employer, by the employee, and by this Court in prior opinions describes the substance of the payment and should result in taxability. Among other things, the majority disregards previously settled law that the intent of the payor as to the purpose in making the payment must be examined. See *Knuckles v. Commissioner* 349 F.2d 610 (10th Cir. 1965), *affg.* a Memorandum Opinion of this Court; *Metzger v. Commissioner* 88 T.C. 834, 847848 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Fono v. Commissioner* 79 T.C. 680, 694 (1982), *affd.* without published opinion 749 F.2d 37 (9th Cir. 1984).

In *Rickel v. Commissioner* 92 T.C. 510 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990), we focused our attention on the characterization of the liquidated damages awarded under the ADEA, noting that "This court and others have consistently held that amounts received in lieu of wages, salary, or lost profits are includable in income." 92 T.C. at 518.

Although the characterization of the ADEA claim was one of first impression, we found the situation analogous to claims of sex discrimination in *Metzger v. Commissioner* 88 T.C. 834, 851-852 (1987), *affd. without published opinion* 845 F.2d 1013 (3d Cir. 1988); *Thompson v. Commissioner* 89 T.C. 632, 649-650 (1987), *affd.* 866 F.2d 709 (4th Cir. 1989); and *Byrne v. Commissioner* 90 T.C. 1000, 1010-1011 (1988), *revd. and remanded* 883 F.2d 211 (3d Cir. 1989).

In *Rickel*, as here, respondent argued that the ADEA creates a contract action, not a tort action, and that the liquidated damages are punitive in nature and therefore taxable. Respondent relied on *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 838 (3d Cir. 1977), where the Court of Appeals for the Third Circuit had characterized ADEA actions and stated that "A suit for damages consisting of back wages arising out of the breach of an employment agreement is a routine contract action where the parties would be entitled to a jury under the Seventh Amendment." Rejecting respondent's contention, we stated:

> The holding of...[Rogers] neither establishes exclusivity of the contract claim nor negates a tort remedy under the ADEA. Like the FLSA and the Equal Pay Act, the ADEA contains elements of both contract and tort claims. Specifically, while damages in lieu of wages are in the nature of a breach of contract action, liquidated damages are intended as compensation for a tort or tort-like injury. [92 T.C. at 520-521.]

Our conclusion concerning the dual nature of the claims settled was consistent with the analysis and conclusions in our prior opinions in *Thompson v. Commissioner* 89 T.C. at 646-647, and *Byrne v. Commissioner* 90 T.C. at 1008-1010.

In *Byrne v. Commissioner* 883 F.2d 211 (3d Cir. 1989), *revg. and remanding* 90 T.C. 1000 (1988), and in *Rickel v. Commissioner* 900 F.2d 655 (3d Cir. 1990), *affg. in part and revg. in part* 92 T.C. 510 (1989), the Court of Appeals for the Third Circuit rejected our approach of bifurcating the types of claims under the FLSA and ADEA and allocating the wage claims to a contract action and the liquidated damages to a tort action. The Court of Appeals in *Rickel v. Commissioner*, *supra*, cited various cases categorizing race discrimination in the workplace as a tort claim for personal injuries. The Court of Appeals for the Third Circuit held that all the damages received by the taxpayer on account of age discrimination are excludable under section 104(a)(2), acknowledging:

> Of course, it might be troubling to some that a successful plaintiff in an ADEA suit will make out better, vis-a-vis federal income tax liability, than if the plaintiff had not been discriminated against in the first place. Although this concern is understandable, we note that we are simply following the Treasury regulation that injects into the analysis tort and contract concepts. Moreover, the successful ADEA plaintiff is being treated no better (or worse now) than the typical tort victim who suffers a physical injury. * * * 900 F.2d at 664.

In *Pistillo v. Commissioner* 912 F.2d 145 (6th Cir. 1990), *revg. and remanding* T.C. Memo. 1989-329, and in *Burke v. United States* 929 F.2d 1119 (6th Cir. 1991), the Court of Appeals for the Sixth Circuit followed a similar analysis and reached the same result in cases involving age discrimination and sex discrimination, respectively.

The Court of Appeals for the Third Circuit in Rickel and the Court of Appeals for the Sixth Circuit in Burke suggested that our opinion abandoned the line of cases that had held that all consequences of personal injury, whether economic or physical, are excludable from taxable income under section 104(a)(2). See *Roemer v. Commissioner* 716 F.2d 693, 697 (9th Cir. 1983), *revg.* 79 T.C. 398 (1982); *Miller v. Commissioner* 93 T.C. 330 (1989), *revd. and remanded* 914 F.2d 586 (4th Cir. 1990); *Metzger v. Commissioner* 88 T.C. 834 (1987), *affd. without published opinion* 845 F.2d 1013 (3d Cir. 1988); *Threlkeld v.*

Commissioner 87 T.C. 1294 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988); *Bent v. Commissioner* 87 T.C. 236 (1986), *affd.* 835 F.2d 67 (3d Cir.1987). The disputed payments in these cases, however, did not arise from settlement of claims that could be characterized as contractual. *Roemer*, *Threlkeld*, and *Miller* involved damages for defamation made against third-party tort-feasors, not against the taxpayer's employer. *Bent* involved infringement of the taxpayer's First Amendment freedoms by refusal to rehire him. His contract claims had been expressly rejected by the State court prior to the settlement payment in issue. See the dissenting opinion of Judge Wellford in *Burke v. United States* 929 F.2d at 1123.

In *Metzger*, the taxpayer received payment in settlement of her claim of violation of her rights to be free from discrimination on account of sex and national origin. We stated:

> ...excludability depends on what was the injury complained of, and the loss of income may merely be "an evidentiary factor" (*Bent*) or "the best measure of loss" (*Threlkeld*). ...in the instant case (1) the evidence is clear that no effort was made to calculate an amount of back pay, (2) the evidence is clear that the college and petitioner sought to settle all the claims for a single lump sum, (3) the college believed that petitioner's contract claim might result in a liability of $15-20,000, and (4) most of petitioners' claims were tort or tort-type claims on account of personal injuries and were not for back pay ...88 T.C. at 858.

In *Metzger*, the taxpayer had not claimed that more than half of the damages received was for tort claims. See the dissenting opinion of Judge Wellford in *Burke v. United States* 929 F.2d at 1123.

In *Byrne v. Commissioner* 90 T.C. 1000, 1011 (1988), *revd. and remanded* 883 F.2d 211 (3d Cir. 1989), and in *Thompson v. Commissioner* 89 T.C. 632, 649-650 (1987), *affd.* 866 F.2d 709 (4th Cir. 1989), equal amounts were allocated by this Court to tort claims and contract claims based on the evidence in those cases. The Court of Appeals in Rickel stated:

> Neither in Byrne nor the instant case had the taxpayer performed uncompensated services for the employer after the challenged discrimination. On the contrary, both taxpayers were seeking compensation for their inability to earn an income due to the tortious action of their employers. Thus, our decision today does not conflict with *Thompson*. Of course, we do not decide whether we would adopt the reasoning of *Thompson* given a similar factual scenario. 900 F.2d at 664-665 n.16; emphasis in original.

This statement was made in response to a suggestion by the Government that the Third Circuit opinion in *Byrne* was inconsistent with the Fourth Circuit opinion in *Thompson*.

In summary, the difference between prior opinions of this Court, on the one hand, and the Courts of Appeals for the Third and Sixth Circuits, on the other, is whether the plaintiff's statutory right in an ADEA lawsuit comprises both contract and tort claims or whether all of the plaintiff's recovery is "on account of" personal injury.

In this case as in its predecessors, we are dealing with statutory rights and remedies that may find analogies in State tort or contract law. Regardless of the labels, however, the tax consequences should be determined by substance. As stated by the majority in this case, "petitioner sought in his complaint, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, back pay plus interest, and liquidated damages." Petitioner's employer had contracted to pay wages to petitioner at a specified rate during the period of petitioner's employment. Historically, employees have been entitled to back wages when employment is wrongfully terminated. The ADEA establishes age discrimination as a wrongful cause of termination. Thus, the employer's interruption of petitioner's employment was unlawful, and the obligation to pay wages continued. The portion of the award labeled back wages is in substance back wages, i.e., it is replacement of lost income, not compensation for personal injury. Thus, it is distinguishable from amounts received from third-party tortfeasors or because of the wrongful conduct of the employer.

With respect to the liquidated damages portion, in Rickel v. Commissioner 92 T.C. at 521-522, we held that liquidated damages in the hands of the taxpayer were compensatory, notwithstanding language in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985), that "The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." Other cases have characterized liquidated damages under the ADEA as punitive damages intended to deter conduct of an employer. *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1494 (9th Cir. 1986); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981). Yet the majority has no trouble characterizing the liquidated damages portion of the award to petitioner as compensatory in the hands of the taxpayer and not treated as punitive damages for tax purposes because of language taken out of the context of other cases. I agree with this approach. I believe that we should follow it also with respect to the back wages rather than merely applying the language of other cases describing the ADEA action as involving tort-type rights.

In a footnote in our opinion in *Byrne v. Commissioner* 90 T.C. 1000, 1011 n.10 (1988), *revd. and remanded* 883 F.2d 211 (3d Cir. 1989), we remarked:

> Petitioner, relying on *Roemer v. Commissioner* 716 F.2d 693, 696 (9th Cir. 1983), revg. 79 T.C. 398 (1982), argues that once she has shown the existence of tort claims, she is not required to present evidence going to an allocation of the damages between tort and contract claims. Her reliance on *Roemer* is misplaced. *Roemer* recognized that when the claim at the root of a damage award was a tort claim, the amount of damages would be measured in part by lost wages,

> but that the tort award should not be treated as income to the extent it was so measured. This Court has followed that principle. See *Metzger v. Commissioner* 88 T.C. at 857-858; *Bent v. Commissioner* 87 T.C. at 250; *Threlkeld v. Commissioner* 87 T.C. 1294, 1299 (1986). However, the situation here does not fall within the *Roemer* principle cited by petitioner. Here, we have been unable to find that the claims settled were solely claims of a tort-like nature. Since both personal injury claims and other claims are settled by the release, the burden is on petitioner to present evidence to allocate the settlement payment between includable and excludable amounts.

Neither *Rickel v. Commissioner* 92 T.C. 510 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990), nor this case presents difficulty in allocation. Here, the parties expressly agreed that 50 percent of the payment received was for back pay, the employer withheld taxes on that amount, and petitioners originally reported that amount as taxable income on their return. The stipulated facts establish that the employer and the employee each regarded only the amount received as liquidated damages excludable under section 104.

In *Rickel v. Commissioner, supra*, the Court of Appeals for the Third Circuit's own prior characterization of an action for back wages as "a routine contract action" was dismissed in a footnote as follows:

> We do not believe that *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), compels a different conclusion. First, the *Rogers* court was characterizing an ADEA action for purposes of determining whether an ADEA plaintiff had the right to a jury trial under the Act, not for tax purposes. *Id.* at 838-39. Second, the

> conclusion by the Rogers court that an ADEA action is a "routine contract action" was gratuitous given that the holding was simply that an ADEA action involves rights and remedies of the sort typically enforced in an action at law. *Id.* And, third, we do not hold today that there are no elements in an ADEA action that do not possess contract type features, only that age discrimination, for purposes of sec. 104(a)(2) of the IRC, is a personal injury and an ADEA action to redress that injury is more like the assertion of a tort type right. *Rickel v. Commissioner* 900 F.2d at 663 n.13.

I respectfully suggest that this rationale does not justify allocation of 100 percent of the ADEA award to a personal injury.

Nims, Parker, Clapp, Jacobs, and Wells, *JJ.*, agree with this opinion.

APPENDIX B

United States Tax Court

---

100 T.C. No. 40
Docket No. 11120-89

Burns P. Downey and Marjorie Downey, *Petitioners*

v.

Commissioner of Internal Revenue, *Respondent*[9]

Filed June 29, 1993

P, an airline pilot, sued his former employer under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), claiming that certain actions of his employer constituted unlawful age discrimination in violation of the ADEA and that such actions were a willful violation of the ADEA. P received the amount of $120,000 in settlement of his ADEA claim. One-half of the settlement amount was allocated to "nonliquidated damages", and one-half to "liquidated damages". In *Downey v. Commissioner* 97 T.C. 150 (1991), we held that both the "liquidated damages" and the "nonliquidated damages" received by P, pursuant to the settlement of his ADEA suit, were excludable under sec. 104(a)(2), I.R.C. Respondent asks us to reconsider our holding in light of the Supreme Court's opinion in *United States v. Burke* 504 U.S. --, 112 S.Ct. 1867 (1992). Held: Upon reconsideration, we adhere to our original holding that all damages which petitioner received on account of his ADEA claim are excludable.

---

[9] This opinion supplements our previous opinion, 97 T.C. 150 (1991).

Steven E. Reick, 728 E. Calhoun St., Woodstock, Ill., for the petitioners.

Marjorie A. Gilbert, James F. Hanley, Jr., and Jan E. Lamartine, for the respondent.

Supplemental Opinion

Ruwe, *Judge:* This case is before the Court on respondent's motion to reconsider our opinion in *Downey v. Commissioner* 97 T.C. 150 (1991), in light of the Supreme Court's decision in *United States v. Burke* 504 U.S. --, 112 S.Ct. 1867 (1992). In our previous opinion, we held that the entire amount received by petitioner Burns P. Downey in settlement of a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), was excludable under section 104(a)(2).[10]

The issue in *United States v. Burke, supra*, was whether an award of backpay based on a sex discrimination claim under title VII was excludable under section 104(a)(2). The Supreme Court held that only damages received on account of a claim that redresses a tort-like personal injury are excludable under section 104(a)(2). *Id.* at --, 112 S.Ct. at 1872. The mere fact that discrimination caused harm to its victim does not mean that it was a tort-like personal injury for purposes of section 104(a)(2).

It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims. The fact that employment discrimination causes harm to individuals does not automatically imply, however, that there exists a tort-like "personal injury" for purposes of federal income tax law. *Id.* at --, 112 S.Ct. at 1872-1873; citations omitted.

---

[10] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

With respect to whether a sex discrimination claim under title VII was a tort-like personal injury claim, the Supreme Court stated:

> No doubt discrimination could constitute a "personal injury" for purposes of S104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy... *Id.* at --, 112 S.Ct. at 1873; emphasis added.

The Supreme Court found that one of the hallmarks of traditional tort liability was the availability of a broad range of damages to compensate the victim. These included damages for intangible elements of injury that were not pecuniary in their immediate consequences. The Court also found that punitive or exemplary damages are generally available in tort actions where the defendant's conduct was intentional or reckless. *Id.* at --,112 S.Ct. at 1871, 1872. In deciding whether a title VII claim evidenced a tort-like conception of injury and remedy, the Supreme Court focused on the remedies "available" under the statutory provisions of title VII. *Id.* at --, 112 S.Ct. at 1871-1874.[11] The Supreme Court found that

---

[11] Justice O'Connor's dissent criticized the majority for focusing on the available statutory remedies. The majority provided the following response:

> The dissent nonetheless contends that we "misapprehen[d] the nature of the inquiry required by sec. 104(a)(2) and the IRS regulation" by "[f]ocusing on [the] remedies" available under Title VII...As discussed above, however, the concept of a "tort" is inextricably bound up with remedies--specifically damages actions. Thus, we believe that consideration of the remedies available under Title VII is critical in determining the "nature of the statute" and the "type of claim" brought by respondents for purposes of sec. 104(a)(2)...*United States v. Burke* 504 U.S. --, --, 112 S.Ct. 1867, 1872 n.7 (1992); citations omitted.

> ...in contrast to the tort remedies for physical and nonphysical injuries discussed above, Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief...*Id.* at --, 112 S.Ct. at 1873.[12]

Because of the limited remedy provided by title VII, the Supreme Court concluded:

> Thus, we cannot say that a statute such as Title VII, whose sole remedial focus is the award of backwages, redresses a tort-like personal injury within the meaning of sec. 104(a)(2) and the applicable regulations. *Id.* at --, 112 S.Ct. at 1874; fn. refs. omitted.[13]

---

[12] The Supreme Court made the following comparisons:

> Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well. For example, 42 U.S.C. sec. 1981 permits victims of race-based employment discrimination to obtain a jury trial at which "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded." The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, "sounds basically in tort" and "contrasts sharply" with the relief available under Title VII. [Id. at --, 112 S.Ct. at 1873-1874; (citations and fn. ref. omitted.)

[13] Subsequent to the title VII claim at issue in United States v. Burke, supra, title VII was amended to allow recovery of future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, as well as punitive damages. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1073. With respect to this amendment, the Supreme Court stated:

> ...we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the

The issue we must decide is whether Mr. Downey's discrimination claim under the ADEA constitutes a tort-like personal injury claim for purposes of section 104(a)(2). If the answer is yes, any damages received on account of that claim are excludable. *Horton v. Commissioner* 100 T.C. --, -- (1993) (slip op. at 7).

In contrast to title VII, the ADEA offers a range of remedies, including both unpaid wages and "liquidated damages". Liquidated damages under the ADEA have been held to "serve both a compensatory and a deterrent or punitive function." *Downey v. Commissioner, supra* at 172; *Rickel v. Commissioner* 92 T.C. 510, 521 (1989), *revd. on other grounds* 900 F.2d 655 (3d Cir. 1990). "Liquidated damages" under the ADEA serve to compensate the victim of age discrimination for certain nonpecuniary losses. *Downey v. Commissioner, supra* at 170. This is a remedy traditionally associated with tort claims. *United States v. Burke* 504 U.S. at --, 112 S.Ct. at 1873. The fact that "liquidated damages" also serve a deterrent or punitive purpose further supports the conclusion that a claim under the ADEA is tort-like. Indeed, the Supreme Court in Burke noted that punitive or exemplary damages are generally available in tort actions where the defendant's misconduct was intentional or reckless. *Id.* at --, 112 S.Ct. at 1871, 1872;[14] see *Horton v. Commissioner, supra* (holding punitive damages received on account of personal injury excludable under section 104(a)(2)).

> amended act signals a marked change in its conception of the injury redressable by Title VII ... *United States v. Burke* 504 U.S. at --, 112 S.Ct. at 1874 n.12.

[14] A claimant under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), also has the right, like ordinary tort plaintiffs, to a jury trial "of any issue of fact." 29 U.S.C. sec. 626(c)(2). By contrast, the Supreme Court noted in *Burke* that: ...the Courts of Appeals have held that Title VII plaintiffs, unlike ordinary tort plaintiffs, are not entitled to a jury trial...*United States v. Burke* 504 U.S. at --112 S.Ct. at 1872; emphasis added.

We hold that the ADEA compensation scheme evidences a tort-like conception of injury and remedy. It follows that discrimination under the ADEA constitutes a tort-like personal injury for purposes of section 104(a)(2), and all damages received by Mr. Downey on account of his ADEA claim are excludable from income. See *Horton v. Commissioner, supra*. We therefore reaffirm our original holding in this case.

Decision will be entered under Rule 155.

Reviewed by the Court.

Hamblen, Parker, Shields, Clapp, Swift, Gerber, Parr, Wells, Colvin, and Chiechi, *JJ.*, agree with the majority.

Cohen, *J.* concurring in the result: I dissented in *Downey v. Commissioner* 97 T.C. 150, 174 (1991) (*Downey I*), and I continue to believe that the result reached by the majority in that opinion is wrong. I would hold in this case that only the liquidated damages were received on account of the tort of willful discrimination and that the back wages were received on account of nontortious breach of the implied terms of the taxpayer's employment. See *Downey I*, 97 T.C. at 177-178 (Cohen, *J.*, concurring in part and dissenting in part).

I do not believe that *United States v. Burke* 504 U.S.--, 112 S.Ct. 1867 (1992), supports the result reached by the majority. The majority opinion refers to a "range of remedies, including both unpaid wages and `liquidated damages'." Majority op. p. 6. Two categories of statutory remedies do not strike me as constituting a range. In actions brought under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), the Courts of Appeals have unanimously denied damages for pain and suffering and emotional distress--typical tort remedies. See, *e.g.*, *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1144 (5th Cir. 1991); *Haskell v. Kaman Corp.*, 743 F.2d 113, 120-121 n.2 (2d Cir. 1984), and cases cited therein. Moreover, under *Burke*, if a plaintiff alleging wrongful termination of employment is only entitled to back wages, that award is taxable. Under this case, if such a plaintiff either proves willfulness or by settlement receives twice the amount of back wages, none of the award is taxable. The Supreme Court in Burke held that an award of back wages was taxable; nothing in that opinion states that adding liquidated damages to such an award makes the total nontaxable. Without a clearer indication from the Supreme Court, I cannot agree that this anomalous result is correct.

I concur here, however, because I believe that *United States v. Burke, supra*, does not provide a clear-cut reason for changing the result in *Downey I*, and all presently extant authorities dealing specifically with ADEA claims support petitioners' position. See *Redfield v. Insurance Company of North America* 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner* 912 F.2d 145 (6th Cir. 1990), *revg.* T.C. Memo. 1989-329; *Rickel v. Commissioner* 92 T.C. 510 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990).

Halpern, *J.*: The issue is whether petitioner Burns P. Downey's claim under the Age Discrimination in Employment Act of 1967 (ADEA) Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), was for a "tort-like personal injury", for purposes of section 104(a)(2). The majority answers that question in the affirmative and I agree. The majority goes much further, however, opining that all claims under the ADEA meet that standard, including claims that, in my view, are dissimilar to Mr. Downey's in pertinent respects. I believe the majority's rationale to be overbroad and therefore respectfully cannot join.

Section 104(a)(2) excludes from gross income "damages received ...on account of personal injuries or sickness". In order for a receipt to be excluded from gross income by section 104(a)(2), the following requirements must be satisfied: (1) The receipt must constitute "damages", meaning an amount obtained through an action or settlement based on tort or tort type rights, sec. 1.104-1(c), Income Tax Regs.; (2) there must be a personal injury; and (3) the damages must have been received on account of such personal injury. The Supreme Court, in *United States v. Burke* 504 U.S. --, 112 S.Ct. 1867 (1992), created a convenient shorthand for these requirements, stating that, to be excludable under section 104(a)(2), an amount must have been received on account of a "tort-like personal injury".

The Supreme Court held that, in determining whether an injury is tortlike, we must consider the remedies available under the cause of action at issue.

> No doubt discrimination could constitute a "personal injury" for purposes of S104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy. *Id.* at --, 112 S.Ct. at 1873.

With respect to whether a cause of action evidences a tort-like conception of injury and remedy, the majority properly observes that "one of the hallmarks of traditional tort liability was the availability of a broad range of damages to compensate the victim." Majority op. p. 3. Accordingly, the majority inquires whether the remedies available to Mr. Downey under the ADEA were sufficiently broad to render his injury "tort-like", as that term is used in Burke. The majority holds that they were, primarily on the ground that the liquidated damages received by Mr. Downey under the ADEA served to compensate him for his nonpecuniary losses, and also because such liquidated damages serve a deterrent or punitive purpose. Majority op. pp. 5-6. I agree. The majority apparently further concludes that, in all instances, the remedies available under the ADEA are sufficiently broad as to evidence "a tort-like conception of injury and remedy" and that, therefore, in all instances "discrimination under the ADEA constitutes a tort-like personal injury". Majority op. pp. 6-7. Those latter conclusions are the key points on which I disagree with the majority.

I. Remedies Available Under the ADEA

The majority states that "In contrast to Title VII, the ADEA offers a range of remedies, including both unpaid wages and `liquidated damages'." Majority op. p. 5. That assertion, however, is overbroad. ADEA section 7(b) provides that a prevailing plaintiff is entitled to liquidated damages "only in cases of willful violations". 29 U.S.C. sec. 626(b) (emphasis added). Accordingly, any victim of nonwillful age discrimination bringing a claim under the ADEA does not have available to him the remedy of liquidated damages.[1] In fact, the only remedy available to such victim would be a claim for unpaid wages, which remedy has been held insufficient to render an injury "tort-like". *United States v. Burke, supra*

II. Analysis

As noted, liquidated damages under the ADEA are unavailable whenever willfulness is not proved. The majority opinion, in my view, is unsatisfactory because it fails to consider the significance of that observation. I believe the significance of that observation to be that the ADEA implicitly creates two mutually exclusive causes of action: One for willful discrimination, and one for nonwillful discrimination. A cause of action for willful discrimination, permitting the recovery of liquidated damages, would evidence a tortlike conception of injury and remedy for the reasons given by the majority. A cause of action for nonwillful discrimination, however, would not -- because it would, in relevant respects, be indistinguishable from Title VII (neither allows any remedy other than the recovery of unpaid wages).

It might be argued that, were we to distinguish between claims for willful and nonwillful discrimination, we would be

---

[1] The Supreme Court recently has had occasion to deal with the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)). *Hazen Paper Co. v. Biggins*, -- U.S. --113 S.Ct. 1701 (1993). One issue dealt with was the meaning of the term "willful" in ADEA sec. 7(b). By way of introduction to its discussion of that issue, the Court recapitulated what it had said in an earlier case (*Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)) concerning the structure of the ADEA: "Congress aimed to create a `two-tiered liability scheme', under which some but not all ADEA violations would give rise to liquidated damages." *Hazen Paper Co. v. Biggins*, -- U.S. --, 113 S.Ct. at 1708.

"`rummaging through the taxpayer's prayers for relief in order to determine the nature of his claim'", thereby attempting to "`simply [define] the nature of the taxpayer's injury by reference to its nonpersonal consequences' (such as lost wages)." *Downey v. Commissioner* 97 T.C. 150, 167 (1991) (quoting *Rickel v. Commissioner* 900 F.2d 655, 661-662 (3d Cir. 1990), *affg. in part and revg. in part* 92 T.C. 510 (1989)). That argument, however, would miss the mark, inasmuch as it is the willfulness of the discrimination-inflicting party--the actor, rather than the acted upon--that separates willful from nonwillful discrimination, and gives rise to disparate remedies for what, arguably, is the same injury, viz, discrimination.

Likewise, it is not the quantum of suffering visited upon the victim of age discrimination that separates recompense for willful discrimination from recompense for nonwillful discrimination under the ADEA. A nonwillfully discriminated-against plaintiff under the ADEA may have suffered the same lost wages and consequential damages as a willfully discriminated-against plaintiff. Nevertheless, the statute only allows the nonwillfully discriminated-against plaintiff one-half the recovery allowed the willfully discriminated-against plaintiff. Such a distinction, based on willfulness, is common; indeed, a distinction based on intent is one of the most basic organizing concepts of legal thinking. Prosser & Keaton, Law of Torts 33 (5th ed. 1984). Intent is the key distinction between two major divisions of legal liability--negligence and intentional torts--and it plays a key role in criminal law, and elsewhere. *Id.* With regard to willful discrimination under the ADEA, the Supreme Court has accepted that, in that context, the term "willful" means conduct that is "not merely negligent". *Hazen Paper Co. v. Biggins*, -- U.S. --, 113 S.Ct. 1701, 1708 (1993). No matter how severe the consequences of nonwillful discrimination, Congress has not thought it appropriate to make liquidated damages available for recompense thereof under the ADEA. The fundamental difference in treatment of willful and nonwillful discrimination under the ADEA should be accepted as sufficient to demonstrate the existence of two distinct (and mutually exclusive) causes of action. Certainly, if Congress had explicitly created different statutes dealing with, respectively, willful and nonwillful age discrimination, it would be quite easy to perceive that two distinct (and mutually exclusive) causes of action are involved; that Congress chose to draw that distinction implicitly, rather than explicitly, ought be of no moment. To conclude otherwise would be to elevate form over substance, which clearly would be inappropriate.

III. Conclusion

Liquidated damages under the ADEA are not available in cases of nonwillful discrimination. The majority, for some unarticulated reason, considers that fact irrelevant, notwithstanding that its holding is dependent upon its finding that "the ADEA offers a range of remedies, including both unpaid wages and 'liquidated damages'." Majority op. p. 5. I disagree with the majority, and would conclude that (1) the ADEA creates distinct causes of action for willful and nonwillful age discrimination, (2) where the cause of action is for nonwillful age discrimination, the remedy of liquidated damages is not available, and (3) a cause of action for nonwillful discrimination, lacking remedies broader than those available under title VII, does not evidence a tort-like conception of injury and remedy and therefore does not redress a "tort-like personal injury" within the meaning of *United States v. Burke* 504 U.S. --, 112 S. Ct. 1867 (1992). Because Mr. Downey's cause of action was for willful discrimination, for which injury the sufficiently broad remedy of liquidated damages is available, I concur in the result reached by the majority.

Whalen and Beghe, *JJ.*, agree with this opinion.

Laro, *J.*, concurring in part and dissenting in part: This case is before us pursuant to respondent's motion for reconsideration of our prior opinion in *Downey v. Commissioner* 97 T.C. 150 (1991) (*Downey I*). In light of the Supreme Court's recent decision in *United States v. Burke* 504 U.S. --, 112 S. Ct. 1867 (1992), respondent requested us to reconsider our earlier opinion in *Downey I*. Respondent's motion has been granted.

In *Burke*, the Supreme Court held that payments received by taxpayers in settlement of backpay claims under title VII of the Civil Rights Act of 1964 (title VII), Pub. L. 88-352, 78 Stat. 253 (current version at 42 U.S.C. secs. 2000e-2000e-17 (1988)), are not excludable from gross income under section 104(a)(2). *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1874. In *Downey I*, we held, by a split (11-6) vote, that both the nonliquidated damages and liquidated damages received by Burns P. Downey (petitioner)[1] in settlement of his claims under the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), were excludable from his gross income under section 104(a)(2). The nonliquidated damages were received by petitioner as unpaid minimum wages (backpay). 29 U.S.C. secs. 216(b), 626(b). The liquidated damages were received by petitioner as an "additional equal amount" on account of a willful violation of the ADEA by petitioner's employer (United). 29 U.S.C. secs. 216(b), 626(b).

Following our reconsideration of *Downey I*, the majority reaffirms the case's expansive view of section 104(a)(2), notwithstanding the decision in *Burke*. I agree with my colleagues in the majority to the extent they reaffirm that the settlement proceeds received by petitioner as liquidated damages are excludable from his taxable income under section 104(a)(2). I respectfully part company with them, however, with respect to the taxability of the nonliquidated damages because I believe the dissent in *Downey I* reached the correct conclusion with respect to the nonliquidated damages, and the dissent's conclusion is strengthened by the decision in *Burke*. The dissent in *Downey I* concluded that section 104(a)(2) does not exclude from taxation the amounts that petitioner received as nonliquidated damages. *Downey I*, supra at 174.

---

[1] The wife of Burns P. Downey, Marjorie Downey, is also a petitioner in this case. For purposes of simplicity and clarity, petitioner will be used solely to refer to Burns P. Downey.

Section 61(a) generally provides that "Except as otherwise provided in [subtitle A of the Internal Revenue Code, see secs. 1 to 1563], gross income means all income from whatever source derived". In enacting section 61(a), and its statutory predecessors, Congress intended to "use the full measure of its taxing power". *Helvering v. Clifford* 309 U.S. 331, 334 (1940).

It is well settled that the definition of gross income under section 61(a) is construed broadly to bring within its definition any accessions to wealth realized by taxpayers, and over which the taxpayers have complete dominion. *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1870; *Commissioner v. Glenshaw Glass Co.* 348 U.S. 426, 431 (1955). It is equally well settled that the exclusions from gross income, such as the ones contained in subtitle A of the Internal Revenue Code, are matters of legislative grace and are construed narrowly to maximize the taxation of any accession to wealth. *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1878 (Souter, *J.*, concurring in the judgment); *United States v. Centennial Savings Bank FSB* 499 U.S. --, -- 111 S. Ct. 1512, 1519 (1991); *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949). It rightfully follows that an accession to wealth, such as the receipt of the settlement proceeds by petitioner, must be included in the broad definition of gross income under section 61(a) unless a narrowly construed exclusion of subtitle A of the Internal Revenue Code clearly directs otherwise. *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1878 (Souter, *J.*, concurring in the judgment).

It is undisputed that, but for an exclusion, all the settlement proceeds received by petitioner would be includable in the broad definition of gross income under section 61(a). The controversy is whether any, or all, of the settlement proceeds fall within the narrowly construed exclusion under section 104(a)(2). To the extent that petitioner's receipt of the settlement proceeds are not clearly within this narrowly construed exclusion, general rules of statutory construction mandate that the proceeds are taxable under section 61(a). *Id.*; *United States v. Centennial Savings Bank FSB, supra* at 1519; *Commissioner v. Jacobson, supra* at 49.

Section 104(a)(2) generally provides that gross income does not include "the amount of any damages received (whether by suit or agreement...) on account of personal injuries or sickness" (emphasis added). The text of section 104, the legislative history thereunder, and the regulations prescribed thereunder do not define the term "personal injuries". See, *e.g.*, H. Rept. 1337, 83d Cong., 2d Sess. 15 (1954); S. Rept. 1622, 83d Cong., 2d Sess. 15-16 (1954). The term "damages received" was defined by the Treasury Department, in regulations published in 1956 under section 104(a)(2), as an "amount received...through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." T.D. 6169, 1956-1 C.B. 63, 65. To date, this regulatory definition remains the same as when it was originally published.

From section 104(a)(2), and the regulations thereunder, we understand that damages received through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of such prosecution, are excludable from gross income if the: (1) Damages were received on account of personal injuries, and (2) suit or action was based upon tort or tort type rights. Sec. 104(a)(2); sec. 1.104-1(c), Income Tax Regs. From Burke, we learn, once again, that we look to the nature of the claim underlying a taxpayer's damage award to determine whether the damages were received on account of personal injuries. *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1872; see also *Rickel v. Commissioner* 92 T.C. 510, 516 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990), *overruled by Downey v. Commissioner* 97 T.C. 150, 168-169 (1991); *Metzger v. Commissioner* 88 T.C. 834, 847 (1987), *affd. without published opinion* 845 F.2d 1013 (3d Cir. 1988); *Threlkeld v. Commissioner* 87 T.C. 1294, 1297 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988); *Fono v. Commissioner* 79 T.C. 680, 694 (1982), *affd. without published opinion* 749 F.2d 37 (9th Cir. 1984). This determination is factual and petitioner bears the burden of proving that respondent's determination is incorrect. Rule 142(a); *Welch v. Helvering* 290 U.S. 111, 115 (1933).

In the case of a settlement, the nature of the claim generally is determined by looking to the settlement agreement. When the settlement agreement explicitly allocates the settlement proceeds between contract and tort claims,[2] the allocation generally is binding to the extent that it is entered into by the parties at arm's length and in good faith. *Fono v. Commissioner, supra* at 694. In this regard, an important factor in determining the reality of the agreement is the "intent of the payor" as to the reason for making the payment. *Knuckles v. Commissioner* 349 F.2d 610, 613 (10th Cir. 1965), *affg.* T.C. Memo. 1964-33; *Metzger v. Commissioner, supra* at 847-848; *Fono v. Commissioner, supra* at 694. The main question to ask is "In lieu of what were the damages awarded?" *Raytheon Production Corp. v. Commissioner* 144 F.2d 110, 113 (1st Cir. 1944), *affg.* 1 T.C. 952 (1943) (emphasis added); *Fono v. Commissioner, supra* at 692.

Applying this analysis to the instant case, petitioner brought a lawsuit against United alleging age discrimination under the ADEA. In relevant part, petitioner's complaint contained two "causes of action".[3] With respect to the first cause of action, petitioner's complaint alleged that United's refusal to allow petitioner to serve as a second officer after petitioner turned 60 years old constituted unlawful age discrimination. Plaintiff's complaint also alleged, as a second cause of action, that United's action was a willful violation of the ADEA. *Downey I,* supra at 154.

---

[2] In *United States v. Burke* 504 U.S. --, --, 112 S. Ct. 1867, 1870-1871 (1992), the Supreme Court indicated that damages for a civil wrong are received on account of either a tort claim or a breach of contract claim, citing Keeton, Dobbs, Keeton, & Owen, Prosser and Keeton on the Law of Torts 2 (1984) ("A 'tort' has been defined broadly as a 'civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.'" (Emphasis added.)).

[3] The term "cause of action" means "The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which entitle party to sustain action and give him right to seek a judicial remedy in his behalf. ...Matter for which action may be maintained." Black's Law Dictionary 221 (6th ed. 1990).

Petitioner and United ultimately resolved this lawsuit in a settlement agreement entered into by the respective parties. Pursuant to the relevant provisions of this agreement, United paid to petitioner $120,000 in consideration of petitioner's release of all claims arising out of his employment relationship with United, whether or not asserted in the ADEA. *Id.* at 155. The settlement agreement explicitly allocated $60,000 of this payment to nonliquidated damages and $60,000 to liquidated damages. The settlement agreement explicitly provided that the nonliquidated damages would be subject to all tax withholdings and tax deductions as required by law. *Id.* at 155. Thus, it is clear that the settlement agreement allocated the settlement proceeds between two separate components, one of which constituted backpay, and that this was the intent of the parties.

A claim of willful discrimination under the ADEA, such as the one made by petitioner, contains elements of both contract and tort. *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 838-842 (3d Cir. 1977); *Rickel v. Commissioner, supra* at 520-521. Thus, in order to determine the taxability of petitioner's recovery under the ADEA, we must bifurcate the settlement proceeds into the part attributable to the contract claim and the part attributable to the tort claim. To the extent that the bifurcated part falls on the tort side of the line, the amount is excludable from gross income under section 104(a)(2). To the extent that the bifurcated part falls on the contract side of the line, the amount is includable in gross income under section 61(a).

A suit that requests damages for backpay, and that arises out of the breach of an employment agreement, is a contract action. *Rogers v. Exxon Research & Engineering Co., supra* at 838; see also *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1878 (Souter, *J.* concurring in the judgment) (the awarding of backpay is "quintessentially a contractual measure of damages"). In this regard, ADEA's ban on age discrimination, like title VII's ban on sex discrimination, is easily seen as a contractual provision implied in every contract as a matter of law. See, *e.g.*, *United*

States v. Burke 504 U.S. at --, 112 S. Ct. at 1878 (Souter, *J.* concurring in the judgment). The primary goal in making compensatory damages available in an ADEA action is to restore age discrimination victims to the economic state they would have been in but for the intervening unlawful discriminatory conduct of their employer. *Kossman v. Calumet County*, 800 F.2d 697, 703 (7th Cir. 1986); *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977). In other words, the compensatory damages under the ADEA allow victims of age discrimination to enjoy the benefit of the bargain they were expecting to receive when they entered into the employment contract with their respective employers. The fact that the right to recover the backpay arises from a statute, such as the ADEA, instead of common law, does not change the essential nature of the case. *Rogers v. Exxon Research & Engineering Co., supra* at 838.

Accordingly, any amount that petitioner received for nonliquidated damages falls on the contract side of the line, and, to that extent, the recovery is not excludable from gross income under section 104(a)(2). *Cf.* Rev. Rul. 72-341, 1972-2 C.B. 32 (payments from employer to employee in settlement of Title VII action are includable in the employee's gross income because the payments would have been received as taxable wages but for the discrimination); see also *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1874 n.13 (Rev. Rul. 72-341, 1972-2 C.B. 32, cited with approval). It is undisputed that, but for the discrimination, an amount awarded as backpay would be taxable upon receipt. Sec. 61(a)(1). The awarding of liquidated damages, on the other hand, is a recovery for a tort or tort-like injury. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (liquidated damages awarded under the ADEA are punitive in nature). As such, any amount that petitioner received for liquidated damages falls on the tort side of the line, and, to that extent, the recovery is excludable from gross income under section 104(a)(2).

It appears that the majority is troubled by the thought of bifurcating a recovery between its tort and contract components. To the majority, it appears, a recovery must be all contract or all tort. To support this proposition, the majority cites and relies on our recent decision in *Horton v. Commissioner*, 100 T.C. -- (1993).

In *Horton*, the defendant paid the plaintiffs/taxpayers both compensatory and punitive damages in connection with a personal injury that the taxpayers sustained when their home was destroyed by a gas explosion and fire caused by the defendant. With respect to the punitive damages, we held that those damages were excludable from the taxpayers' gross income under section 104(a)(2). In so doing, we stated that "Once the nature of the underlying claim is established as one for personal injury, any damages received on account of that claim, including punitive damages, are excludable." *Id.* at -- (slip op. at 7).

With regard to *Horton*, it is important to note that we explicitly stated that respondent did not argue that part of the punitive damages were allocated to something other than personal injury (e.g., property damage). *Id.* at -- (slip op. at 4 n.3). As Judge Beghe noted in his concurrence, the result might well have been different, in part, if respondent had made such an argument. *Id.* at -- (slip op. at 16). More specifically, to the extent that the punitive damages in *Horton* were attributable to property damage, a strong argument could have been made that those punitive damages were taxable because they were not received "on account of personal injuries."

This bifurcation approach is supported by many of our decisions prior to *Downey I*. These prior cases were thoroughly discussed in Judge Cohen's opinion in *Downey I*, see *Downey v. Commissioner* 97 T.C. 150, 175-180 (1991) (Cohen, *J.*, concurring in part and dissenting in part), and need not be discussed here. By this reference, however, Judge Cohen's discussion of these cases is incorporated herein. See also *Stocks v. Commissioner* 98 T.C. 1, 17 (1992) (the Court also applied this bifurcation approach to the facts of a case decided after *Downey I*).

The majority herein fails to discuss the taxability of proceeds received in connection with a nonwillful violation under the ADEA, understandably so seeing that this case involves a willful violation. Notwithstanding that a nonwillful violation is not at issue here, I believe that a resolution of this case requires a brief discussion of the taxability of proceeds received in connection with a nonwillful violation. In the case of a nonwillful violation, it appears that a plaintiff's recovery, which is limited solely to backpay, see 29 U.S.C. sec. 626(b) (prevailing plaintiff entitled to additional equal amount only in cases of willful violations); *Hazen Paper Company v. Biggins*, -- U.S. --, --, 113 S. Ct. 1701, 1708-1709 (1993) (same), is not excludable under section 104(a)(2) because the recovery flows from a breach of contract. See, *e.g.*, *United States v. Burke* 504 U.S. at --, 112 S. Ct. at 1874 ("we cannot say that a statute such as title VII, whose sole remedial focus is the award of backwages, redresses a tort-like personal injury within the meaning of section 104(a)(2) and the applicable regulations." (Emphasis added; fn. ref. omitted.)). If this is the case1 as it appears, it seems illogical that a taxable recovery becomes nontaxable merely because the taxpayer/plaintiff establishes that the employer's violation is willful, and is awarded an additional equal amount on account of such a violation.

In conclusion, the majority in *Downey I* stated that "we no longer can distinguish age discrimination from sex discrimination". Downey I, supra at 168. If this is so, we should reverse our decision in Downey I because we have recently learned that an amount received on account of sex discrimination under title VII is not excludable from income under section 104(a)(2). *United States v. Burke* 504 U.S. at --112 S. Ct. at 1874. Because I believe that the taxability of backpay recovered under Title VII is commensurate with the taxability of backpay recovered under the ADEA,[4] I respectfully dissent.

Jacobs, *J.*, agrees with this concurring in part and dissenting in part opinion.

---

[4] See, *e.g.*, *Hodgson v. First Federal Savings and Loan Association*, 455 F.2d 818, 820 (5th Cir. 1972) (substantive provisions of the ADEA generally are, in terms, identical to those of Title VII except that "age" has been substituted for "race, color, religion, sex, or national origin"); *Rickel v. Commissioner* 92 T.C. 510, 517 (1989), *affd. in part and revd. in part* 900 F.2d 655 (3d Cir. 1990), *overruled by Downey v. Commissioner* 97 T.C. 150, 168-169 (1991).

APPENDIX C

UNITED STATES TAX COURT

Burns P. Downey and)
Marjorie Downey,)
Petitioners)
v) Docket No. 11120-89
)
Commissioner of Internal Revenue,)
Respondent)

DECISION

Pursuant to the opinion of the Court filed July 31, 1991, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there is an overpayment in income tax for the taxable year 1985 in the amount of $6,844.00, which amount was paid: $3,250.00 on February 1, 1990, and $3,594.00 on April 15, 1986; and for which amount a claim for refund could have been filed, under the provisions of I.R.C. §6511(b)(2), on February 23, 1989, the date of the mailing of the notice of deficiency;

That there are no additions to tax due from the petitioner for the taxable year 1985, under the provisions of I.R.C. §§6653(a)(1) and 6653(a)(2); and

That there is no addition to tax due from the petitioner for the tax year 1985, under the provisions of I.R.C. §6661.

/s/ *Robert P. Ruwe*
Robert P. Ruwe, Judge

Entered: August 25, 1993

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-3763

Burns P. and Marjorie Downey, *Petitioners-Appellees*

v.

Commissioner of Internal Revenue, *Respondent-Appellant*

Appeal from the Decision of the United States Tax Court.
No. 11120-89-**Robert P. Ruwe**, *Tax Court Judge*.

Argued April 11, 1994-Decided August 30, 1994

Before CUMMINGS, FLAUM and KANNE, *Circuit Judges*.

FLAUM, *Circuit Judge:* Burns P. Downey along with his wife Marjorie filed a joint petition in the Tax Court challenging the Commissioner's assertion that they owed additional tax for 1985. The Tax Court found for the Downeys, holding that the amount received by a taxpayer in settlement of litigation under the Age Discrimination in Employment Act ("ADEA") is excludable from gross income under IRC §104(a)(2). We reverse and remand this case to the tax court.

I. Background

United Air Lines Inc. ("United") forced Burns Downey, an airline pilot, into retirement at the age of sixty. Burns responded by filing a federal suit alleging a violation of the ADEA. *See* 29 U.S.C. §§621 *et seq.* On December 27, 1985, Burns and United entered into a settlement agreement--for

$120,000 Burns agreed to release United from all claims. The parties structured their settlement payments by calling half of the money "back-pay," and the other half "liquidated damages." The Downeys' reported only the back-pay portion ($60,000) as income on their 1985 tax return. On February 23, 1989, the IRS issued a notice of deficiency to the taxpayers of $43,237 for 1985. In response the Downeys filed a petition in the Tax Court seeking a redetermination of the assessment. The Downeys claimed an exception for both the liquidated damages and back-pay portions of the settlement payment.

On a fully stipulated factual record the Tax Court held that both portions of the ADEA settlement payment were excludable from gross income under IRC §104(a)(2). However, upon learning of *Burke v. United States* 929 F.2d 1119, 1123 (6th Cir. 1991) ("*Burke I*"), *rev'd* 112 S.Ct. 1867 (1992) ("*Burke*"), then pending before the Supreme Court, the Tax Court withheld issue of its mandate. After the Supreme Court released *Burke* (holding that back-pay settlement awards received under Title VII are not excludable under IRC §104(a)(2)), 112 S.Ct. at 1873, the Commissioner filed a motion in the Tax Court for reconsideration (under *Burke*) of the Downeys' claim. After review the Tax Court issued a supplemental opinion holding that (1) the ADEA "evidence[d] a tort-like conception of injury and remedy" for purposes of *Burke*, and (2) all of the Downeys' damages received through their ADEA litigation are excludable from tax.

II. Discussion

On appeal the Commissioner argues that an ADEA settlement payment providing for the separate payment of back-pay and liquidated damages does not fit within any recognized tax exception including IRC §104(a)(2). We agree. Since *Stanton v. Baltic Mining Co.* 240 U.S. 103 (1916), the United States can require persons who receive income within its jurisdiction to share part of that income with the national treasury though direct federal income taxes. To this end Congress has defined taxable income to include, generally, all income not specifically excluded by the code. See IRC §§61-63. As the Supreme Court has observed, Congress "exert[ed] the full measure of its taxing power, and [brought] within the definition of income any accession to wealth." *Burke* 112 S.Ct at 1870 (citations omitted). Thus, all accessions to wealth are taxable unless a taxpayer can fit his gain into a statutory exception. The Downeys believe they have found such an exception. Damages received from a personal injury lawsuit, as provided under IRC § 104(a)(2), are among those sources of gain that have been statutorily excepted from taxation. The text of IRC §104(a)(2) provides as follows:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include . . . the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

Our task is to determine whether settlement payments pursuant to an ADEA lawsuit fall within this exception.

In reading §104(a)(2) we note that the taxable status of a settlement agreement must be determined by the nature of the claim upon which the litigation was first based. The text of §104(a)(2)--"the amount of any damages received (whether by *suit* or *agreement*...)" --indicates that payments of a settlement agreement are to be treated for tax purposes as if the money came by an award in the underlying suit. *See Burke* 112 S.Ct. at 1872 (holding that the taxable character of the settlement payment must be the same as if the payment arose from an award on the underlying claim). Thus, before we may characterize the Downeys' settlement agreement we must analyze the character of the damages available under an ADEA suit. We again find relevant language in the text of §104(a)(2). The language of the text limits the exception to only "damages received . . . on account of personal injuries or sickness. . . ." IRC §104(a)(2). Justice Scalia cogently argued that the plain language of §104 must be read as only excluding awards from injuries to a taxpayer's physical or mental health (and consequently awards such as the Downeys' would not be excludable under § 104(a)(2)). *See Burke* 112 S.Ct. at 1874 (Scalia *J.*, concurring). The treasury regulations drafted to enforce §104(a)(2) have interpreted the term "damages" to mean an amount received through prosecution or settlement of an action based upon tort or tort-type rights. Treas. Reg. §1.104-1(c). This treasury regulation deserves judicial deference so long as the agency's interpretation is within the reasonable range of the statutory text. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Justice Scalia has suggested that this regulation so misses the mark when compared with the language of IRC §104(a) that it is not entitled to deference under *Chevron. Burke* 112 S.Ct. at 1874 (Scalia *J.* concurring). While this view has considerable attraction, we need not consider the viability of the treasury regulation if we find that a suit under the ADEA does not even clear the Treasury's low hurdle of being "tort-type" (and thus its damages constitute taxable income regardless).

The issue of whether ADEA claims are at least tort-like, while new to our court, has been addressed by other courts of appeal. *See Rickel v. Commissioner* 900 F.2d 655 (3d Cir. 1990) (holding for the exclusion of such settlement agreements from taxation under §104); *Pistillo v. Commissioner* 912 F.2d 145 (6th Cir. 1990); and *Redfield v. Insurance Company of North America* 940 F.2d 542 (9th Cir. 1991). We note, however, that all these decisions antedate the Supreme Court's explanation of § 104(a)(2) in *Burke*. As the Tax Court recognized that the analytical framework adopted in *Rickel, Pistillo* and *Redfield* was inconsistent with the approach later taken in Burke, we limit our discussion to *Burke* as the most pertinent teaching on this matter.

In *Burke*, the Court reversed a Sixth Circuit decision that had held back-pay (received in settlement of a Title VII lawsuit) excludable from gross income under §104(a)(2). See *Burke I* 929 F.2d at 1123, *rev'd* 112 S.Ct. at 1870. The court of appeals had adopted the reasoning of both *Pistillo* and *Rickel* in rejecting the federal government's position that the remedies provided by the statute determined whether the provision created a tort-type right. In reversing the Sixth Circuit, however, the Court expressly defined a tort as a "'civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages,'" *Burke* 112 S.Ct. at 1870-71 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* 2 (1984)), and emphasized that "it is solely by virtue of the right to damages that the wrong complained of is to be classed as a `tort.'" *Burke* 112 S.Ct. at 1871 (quoting R. Heuston, *Salmond on the Law of Torts* 9 (12th ed. 1957)). The Court reasoned that because the concept of a tort is inextricably bound up with the nature of the remedies, the remedial scheme embodied in the statute is the critical factor for §104(a)(2) purposes. *Burke* 112 S.Ct. at 1872 n.7 ("We believe that consideration of the remedies available under Title VII is critical in determining the `nature of the statute' and the `type of claim' brought by respondents for purposes of §104(a)(2)"). The Court then examined the nature of the remedies provided by Title VII and concluded that the statute did not redress a tort-type personal injury within the meaning of §104(a)(2). *Burke* 112 S.Ct. at 1872-74.

Burke teaches us that the hallmark of tort liability is the availability of a broad range of damages to compensate the plaintiff for injuries caused by the violation of a legal right, and while such damages often are described in compensatory terms, tort damages usually "redress intangible elements of injury." *See Burke* 112 S.Ct. at 1871. We believe that *Burke* stands for the proposition that a federal anti-discrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax exempt treatment under §104(a)(2). The issue in this case, therefore, reduces to whether the ADEA provides compensatory damages for those intangible elements of injury essential to a personal injury tort action.

Congress created the ADEA in the hope of promoting the employment of older persons by banning arbitrary age discrimination. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §2(b), 81 Stat. 602. The remedial provision of the ADEA empowers courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the statute]." 29 U.S.C. §626(b). Significantly, however, for

§104(a)(2) purposes, litigants under the ADEA may not recover the broad range of compensatory damages for intangible elements of injury that characterize tort-type personal injury statutes. ADEA litigants cannot recover damages for either pain and suffering, *Pfeiffer v. Esses Wire Corp.*, 682 F.2d 684, 687-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982), or for emotional distress, *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984). With respect to remedies, the only difference between the scheme embodied under the ADEA and that under Title VII is that under the ADEA a plaintiff may often recover liquidated damages in addition to lost wages when the employer's violation of the statute has been willful. See 29 U.S.C. §626(b) (providing for equitable, judicial and legal relief for violation of the ADEA); *see also Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1710 (1993) (holding that liquidated damages were available when an employer knows its conduct is illegal). Thus, unless the nature of the ADEA liquidated damages recompense for the intangible elements of a tort-type injury, we are bound by Burke to hold that all ADEA damages are nonexcludable under §104(a)(2).

At the present time there is a division in the courts of appeals over the character of the ADEA liquidated damages. Some circuits have stated that the character of liquidated damages is strictly punitive, see *Reichman v. Bonsignore, Brignati & Mazzota P.C.*, 818 F.2d 278, 282 (2d Cir. 1987); *Criswell v. Western Airlines Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 & n.7 (11th Cir. 1987), while others have stated that ADEA liquidated damages replace prejudgment interest, *see Power v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990); *Hamilton v. 1st Source Bank*, 895 F.2d 159, 166 (4th Cir. 1990); *McMann v. Texas City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993); *Rose v. National Cash Register Corp.*, 703 F.2d 225, 229-30 (6th Cir. 1983). This court adheres to the position that ADEA liquidated damages replace prejudgment interest, *see e.g., Fortino v. Quasar Co.*, 950 F.2d 389, 397-89 (7th Cir. 1992); *EEOC v. O'Grady*, 857 F.2d 383, 391 n.13 (7th Cir. 1988); *Coston v. Plitt*

Theaters, Inc., 831 F.2d 1321, 1335-37 (7th Cir. 1987), *vacated on other ground*, 486 U.S. 1020 (1988), *on remand*, 860 F.2d 834 (7th Cir. 1988). The rational implication is that as a replacement for prejudgment interest, liquidated damages, as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations--as a type of contract remedy. *See Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) (discussing liquidated damages as they relate to contractual remedies). In any event, whatever the appropriate characterization of ADEA liquidated damages (be they punitive or contractual), as a matter of law they do not compensate for the intangible elements of a personal injury. Thus lacking an essential element of a tort-type claim, such damages cannot be excluded from taxation under §104(a)(2). The Downeys' back-pay and liquidated damages payments are taxable. This case is reversed and remanded to the tax court for proceedings consistent with this opinion.

REVERSED and REMANDED

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

November 18, 1994

HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

No. 93-3763
Burns P. and Marjorie Downey, *Petitioners-Appellees*

v.

Commissioner of Internal Revenue, *Respondent-Appellant*

Appeal from the Decision of the United States Tax Court.
No. 11120-89-**Robert P. Ruwe**, *Tax Court Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on September 13, 1994, by petitioners-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-5555
Summary Calendar

Erich E. Schleier and Helen B. Schleier, *Petitioners-Appellees*

v.

Commissioner of Internal Revenue, *Respondent-Appellant*

Appeal from the Decision of the United States Tax Court.

Before KING, HIGGINBOTHAM, and BARKSDALE, *Circuit Judges*.

PER CURIAM:*

Erich E. Schleier received a settlement for back pay and liquidated damages under the Age Discrimination in Employment Act. 29 U.S.C. §§621-34. Schleier and his wife, Helen B., paid federal income taxes on the back pay but not on the liquidated damages. The government issued a statutory notice of deficiency for failure to pay taxes on the liquidated damages. The Schleiers responded that they were entitled to a refund for the taxes they paid on the back pay. The United States Tax Court concluded that the entire settlement under the ADEA was excludable from Schleier's income pursuant to Section 104(a)(2) of the Internal Revenue Code. 26 U.S.C. §104(a)(2). The government appeals. We have already decided the issue. Money recovered under the ADEA is excludable from income for the purposes of taxation. *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993) We AFFIRM.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdent on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-70960
Tax Court No. 4844-90

John A. Schmitz, Mary B. Schmitz, *Petitioners-Appellees,*

v.

Commissioner of Internal Revenue, *Respondent-Appellant.*

Appeal from the Decision of the United States Tax Court.

Argued and Submitted
April 11, 1994-San Francisco, California
Filed August 30, 1994

Before GOODWIN, FERGUSON and TROTT, *Circuit Judges.*

OPINION

GOODWIN, *Circuit Judge:* The Commissioner appeals a tax court summary judgment granted in favor of taxpayers John and Mary Schmitz. The Commissioner argues that damages the Schmitzes received in settlement of an Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 et seq., lawsuit are taxable income. The tax court held that the Schmitzes' ADEA settlement was excludable from gross income as "damages received . . . on account of personal injuries or sickness." 26 U.S.C. §104(a)(2) (1988). We affirm.

I.

John Schmitz is a former employee of United Airlines, Inc. ("United") and a plaintiff in an ADEA class action against United. In 1986, United paid Schmitz $115,050 in settlement of his age discrimination claims. According to the settlement agreement, half of this payment was "back pay" and the other half was "ADEA liquidated damages."

The Schmitzes initially reported the back wages portion of the settlement as gross income received in 1986, excluding the liquidated damages. The Commissioner issued a notice of deficiency, alleging that the Schmitzes' entire award was taxable. The Schmitzes filed a tax court petition, arguing that the liquidated damages portion of the settlement was excludable from gross income under 26 U.S.C. §104(a)(2). After the Third Circuit decided *Rickel v. Commissioner* 900 F.2d 655 (3d Cir. 1990), the Schmitzes amended their petition, claiming that both the back pay and the liquidated damages were excludable.

The tax court held that the Schmitzes' entire settlement was excludable from gross income under *Downey v. Commissioner* 97 T.C. 150 (1991), *aff'd on reconsideration,* 100 T.C. 634 (1993), *appeal pending,* No. 93-3763 (7th Cir. Nov. 17, 1993). The Commissioner appealed.

II.

We review tax court decisions on the same basis as civil bench trials held in federal district court. *Ball, Ball, & Brosamer, Inc. v. Commissioner* 964 F.2d 890, 891 (9th Cir. 1992). Thus, we review the tax court's grant of summary judgment *de novo* to determine whether there are any genuine issues of material fact and whether the tax court correctly applied the law. *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1446 (9th Cir. 1994). Because this case presents no genuine issues of material fact, we agree that summary judgment was appropriate. We therefore review the tax court's legal conclusions *de novo*, *Pacific First Fed. Savs. Bank v. Commissioner* 961 F.2d 800, 803 (9th Cir.), *cert. denied,* 113 S.Ct. 209 (1992), construing the relevant exemptions narrowly in favor of taxation. *United States v. Centennial Savs. Bank* 499 U.S. 573, 583-84 (1991); *United States v. Wells Fargo Bank* 485 U.S. 351, 354 (1988).

III.

At the time of the Schmitzes' settlement,[21] §104(a)(2) provided:

> §104. Compensation for injuries or sickness
>
> . . . [G]ross income does not include--. . . (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . .

IRS regulations define "damages received" as "amount[s] received... through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution. "26 C.F.R. §1-104-1(c) (1993).

In *Hawkins,* we set forth a two-part test for determining whether damages received in a lawsuit are excludable under §104(a)(2) *United States v. Hawkins* No. 93-15828, slip op., -- F.3d --, -- (9th Cir. July 19, 1994). We said a taxpayer must show both (1) that the underlying cause of action was tort-like within the meaning of *United States v. Burke* 112 S.Ct. 1867, 1870 (1992), and 26 C.F.R. §1.104-1(c), and (2) that the damages were received "on account of" the taxpayer's personal injury. Id.

---

[21] Congress has since amended §104(a)(2) to provide that punitive damages received in cases not involving physical injury are not excludable. Pub. L. No. 101-239, S7641(a), 103 Stat. 2379 (1989). However, these amendments are expressly limited to punitive damages received after June 10, 1989, and do not apply to the Schmitzes' 1986 award. We express no opinion on taxation of ADEA liquidated damages received after June 10, 1989, as that issue is not before us.

We must therefore decide (A) whether ADEA creates a tort-like cause of action and (B) whether the Schmitzes' back pay and liquidated damages were received on account of their personal injuries.

A. ADEA Creates a "Tort-like" Cause of Action.

Until recently, the case law firmly established that ADEA lawsuits were "tort-like" within the meaning of §104(a)(2) and 26 C.F.R. §1.104-1(c). *See Redfield v. Insurance Co. of North America* 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner* 912 F.2d 145 (6th Cir. 1990); *Rickel v. Commissioner* 900 F.2d 655 (3d Cir. 1990); *Downey v. Commissioner* 97 T.C. 150 (1991). However, these cases relied on *Threlkeld v. Commissioner* 87 T.C. 1294, 1308 (1986), *aff'd* 848 F.2d 81 (6th Cir. 1988), which held that damages are excludable under §104(a)(2) if they were "received on account of any invasion of rights that an individual is granted by being a person in the sight of the law."

The Supreme Court recently changed this analysis, suggesting that even lawsuits which meet the *Threlkeld* test might not be tort-like for purposes of §104(a)(2) if they do not "evidence a tort-like conception of injury and remedy." *United States v. Burke* 112 S.Ct. 1867, 1873 (1992). The Court, discussing damages awarded under the pre-1991 version of Title VII, agreed that "discrimination could constitute a `personal injury' for purposes of §104(a)(2)." *Id.* However, the Court found that the pre-1991 version of Title VII was not tort-like because it did not provide for jury trials or "allow awards for compensatory or punitive damages," instead "limit[ing] available remedies to back pay, injunctions, and other equitable relief." *Id.* at 1873-74.[22] According to the Court, this unavailability of jury trials and failure to "recompense Title VII plaintiffs for anything beyond the wages properly due them" distinguish pre-1991 Title VII actions from ordinary tort actions and actions filed under other federal antidiscrimination statutes, such as Title VIII and 42 U.S.C. §1981. *Id.* at 1874.

---

[22] Congress has since amended Title VII to allow jury trials, compensatory damages, and punitive damages. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). Thus, the current version of Title VII may redress a tort-like personal injury. See *Burke* 112 S.Ct. at 1874 n.12; Rev. Rul. 93-88.

Most post-*Burke* courts addressing the issue have held that ADEA damages are still excludable, even under the Supreme Court's more restrictive test. *See, e.g., Purcell v. Sequin State Bank & Trust Co.*, 999 F.2d 950, 960-61 (5th Cir. 1993); *Downey v. Commissioner* 100 T.C. 634, 637 (1993); *Bennett v. United States* 30 Fed. Cl. 396 (1994); *Rice v. United States 834* F.Supp. 1241, 1243-45 (E.D. Cal. 1993), *appeal pending*, No. 93-16272 (9th Cir. Sept. 9, 1993); *cf. Abrams v. Lightolier*, 841 F.Supp. 584, 596 (D.N.J. 1994) (addressing a state law age discrimination award).[23] As these courts have noted, ADEA, unlike the pre-1991 version of Title VII, provides for jury trials. *Bennett* 30 Fed. Cl. at 399. In addition, while ADEA does not provide for nonpecuniary compensatory damages or punitive damages "by name", *Rice* 834 F.Supp. at 1244, it does provide for "liquidated damages" in cases of willful discrimination. 29 U.S.C. §626(b). These liquidated damages "serve to compensate the victim of age discrimination for certain nonpecuniary losses" and also serve "a deterrent or punitive purpose." *Downey* 100 T.C. at 637; *Rice* 834 F.Supp. at 1244. Thus, unlike the unamended version of Title VII, ADEA does not simply recompense plaintiffs for the wages properly due them.

The Commissioner argues that the remedies available under ADEA are still "circumscribed" within the *Burke* Court's meaning, *Burke*, 112 S.Ct. at 1873, because, like the unamended version of Title VII, ADEA does not provide damages for plaintiffs' emotional distress or pain and suffering. *See Chancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Naton v. Bank of*

---

[23] *But see. Maleszewski v. United States* 827 F.Supp. 1553 (N.D. Fla. 1993) (ADEA not tort-like); *Shaw v. United States* -- F.Supp. --, 1994 WL 237039 (M.D. Ala. Apr. 5, 1994) (following *Maleszewski*).

California, 649 F.2d 691,698-99 (9th Cir. 1981). The Commissioner argues that ADEA liquidated damages represent only punitive damages, and thus the statute does not evidence a tort-like conception of remedy.

We disagree. The case law and legislative history indicate that ADEA liquidated damages have a compensatory as well as a punitive purpose. See Section B, *infra.* In addition, "*Burke* does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort-type right." *Bennett* 30 Fed. Cl. at 400. As other courts have held, ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*. Moreover, even if ADEA liquidated damages have a punitive purpose, such a purpose appears more tort-like than contract-like.

We cannot accept the Commissioner's argument that ADEA actions are basically *ex contractu*. *See, e.g., Redfield* 940 F.2d at 546 ("Nothing in ADEA reflects a congressional attempt to rewrite the terms of employment contracts."). Contract rights arise from the parties' private-law relationship; each litigant's rights and duties depend primarily on the terms of their agreement. In contrast, a tort is "a `legal wrong committed upon the person or property independent of contract' . . . `a violation of some duty owing to the plaintiff, . . . generally, [arising] by operation of law and not by mere agreement of the parties.' "*Downey* 97 T.C. at 160 (quoting Black's Law Dictionary, 1489 (6th ed. 1990)). The public-law duty not to discriminate exists regardless of the parties' contractual relationship; ADEA applies not only to firing and promotion decisions, but also to hiring decisions, when no contract exists. *Downey* 97 T.C. at 169; *Burke* 112 S.Ct. at 1879-80 (O'Connor, *J.*, dissenting). For convenience and for statute of limitations purposes, most courts classify discrimination and civil rights violations as torts. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987); *Wilson v. Garcia,* 471 U.S. 261, 276 (1985).

The Burke majority acknowledged that discrimination could be a personal injury tort within the meaning of §104(a)(2), as the pre-*Burke* courts had long held. 112 S. Ct. at 1873. The Court did not hold that employment discrimination, generally, was not a personal injury; it held only that the pre-1991 version of Title VII, with its "circumscribed remedies," did not evidence a tort-like conception of personal injury. *Id.* at 1873. In reaching this conclusion, the Court specifically relied on the unavailability of jury trials and the lack of compensatory or punitive damages in Title VII actions. Because both of these remedies are available under ADEA and because discrimination constitutes a personal injury, we conclude that ADEA establishes a tort-like cause of action within the meaning of *Burke* and §104(a)(2).

B. The Schmitzes' ADEA Liquidated Damages Were Received "On Account of" Personal Injuries.

The Commissioner also argues that, even if ADEA creates a tort-like cause of action, the Schmitzes' liquidated damages are not excludable because these damages were awarded "on account of" United's willful misconduct, rather than "on account of" the Schmitzes' personal injury. §104(a)(2).[24] We agree that

---

[24] The Commissioner does not make this argument about the Schmitzes' back pay award, apparently conceding that, if ADEA creates a tort-like cause of action, the Schmitzes' back pay or nonliquidated damages are excludable. We agree. Although this rule creates the somewhat anomalous result that back-pay and future earnings awarded in a lawsuit are not taxable, while "wages . . .paid in the ordinary course [of employment]" are fully taxable, *Burke* 112 S. Ct. at 1874, this anomaly exists in physical injury cases as well. Id. at 1880 (O'Connor, *J.*, dissenting). As the Third Circuit has noted, we must compare John Schmitz not to a current United employee, but to a United employee who can no longer work because of a lost arm or other personal injury. *See, Rickel* 900 F.2d at 664 ("Of course it might be troubling to some that a successful plaintiff in an ADEA suit will make out better, vis-a-vis federal income tax liability, than if the plaintiff had not been discriminated against in the first place. . . . [However,] the successful ADEA plaintiff is being treated no better (or worse now) than the typical tort victim who suffers a physical injury").

Under §104(a)(2), if a taxpayer receives damages for a personal injury "[a]ll income [including lost wages] in compensation of that injury is excludable under section 104(a)(2)." *Threlkeld* 848 F.2d at 84. See also *Burke* 112 S. Ct. at 1880 (O'Connor, *J.*, dissenting); *Purcell,* 999 F.2d at 960 ("Back pay awards are nontaxable when they redress a tort-like injury."); *Redfield* 940 F.2d at 546; *Pistillo* 912 F.2d at 150; *Rickel* 900 F.2d at 664 ("[J]ust as in the

§104(a)(2)'s "on account of" language, as well as its title, "Compensation for Personal Injury or Sickness," implies that damages are not excludable unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury. *Hawkins*, -- F.3d at --; *see also Reese v. United States* 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller* 914 F.2d 586 (4th Cir. 1990); *Rice* 834 F.Supp. at 1245-46; Rev. Rul. 84-108.[25]

However, we do not agree that ADEA liquidated damages are solely punitive in nature or that they do not bear any relation to the underlying personal injury. ADEA on its face provides for "liquidated," not punitive, damages. 29 U.S.C. §626(b). Liquidated damages were traditionally awarded to compensate victims for damages which are too obscure and difficult to prove. *See Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945) ("The liquidated damage provision [of the Fair Labor Standard Act, on which ADEA is based] is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages."); *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 583-84 (1942) ("[L]iquidated damages . . . are compensation, not a penalty or punishment by the Government . . . the retention of a workman's pay may well result in damages too obscure and

---

case of a physical personal injury, all the damages received by the taxpayer on account of age discrimination are excludable under §104(a)(2)"); *Downey* 97 T.C. at 165-69.

The Commissioner does not indicate whether United paid Federal Insurance Contributions Act ("FICA") taxes on the backpay award; thus, we express no opinion on whether backpay received under ADEA constitutes "wages" for FICA purposes. See *Burke* 112 S. Ct. at 1869 *n.*1; *Kendrick v. Jefferson County* Bd. of Ed., 13 F.3d 1510, 1514 (11th Cir. 1994) (interpreting the Supreme Court's footnote as an "indicat[ion] that FICA taxation may be a different matter").

[25] *But see, Horton v. Commissioner* 100 T.C. 93 (1993), *appeal pending*, No. 93-1928 (6th Cir. July 13, 1993).

difficult of proof for estimate other than by liquidated damages."); see also Black's Law Dictionary 6th Ed. at 391 (1990) (liquidated damages, unlike penalties, represent a "good faith effort to estimate [the] actual damages that will probably ensue").

The concurrence contends that the term "liquidated," despite its appearance in the text of the statute, is a misnomer," and that ADEA liquidated damages are in fact punitive damages.[26] However, ADEA liquidated damages differ from common law punitive damages in significant ways. More importantly, we believe that looking beyond Congress's explicit language and attempting to discern whether Congress's "real purpose" was punitive or compensatory will "sow more confusion than clarification." If Congress said "liquidated," we will assume that Congress meant liquidated.

Nor do we believe that the "liquidated" label is in fact a misnomer. Unlike common law punitive damages, ADEA liquidated damages do bear a relation to the underlying personal injury: They must equal the plaintiff's total pecuniary loss. 29 U.S.C. §626(b); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348-49 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988). Thus, unlike the punitive damages discussed in Hawkins, which were based on the defendant's conduct and wealth, and have no relation to the plaintiff's particular injury, ADEA liquidated damages are proportionate to the personal injury suffered: The more severe the plaintiff's economic injury, the greater her ADEA liquidated damage award.

---

[26] In support of this assertion, the concurrence states that ADEA liquidated damages are distinguishable from FLSA liquidated damages because the former are awarded only for "willful" violations, while (according to the concurrence) latter are awarded "automatically." However, as the concurrence concedes in a footnote, FLSA also gives the judge discretion not to award liquidated damages (or to award reduced liquidated damages), if the violation is not willful. Thus, the difference between these two damages provisions is not nearly as great as the concurrence suggests: In ADEA, plaintiffs get liquidated damages if the violation was willful; in FLSA, they get liquidated damages unless the employer proves that the violation was not willful. While the burden of proof may differ, under both statutes, liquidated damages depend on the culpability of the employer.

As the Commissioner and the concurrence emphasize, ADEA liquidated damages likely also have a punitive purpose--they are available only for "willful" violations and serve not only to compensate but also to deter. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (stating, in interpreting ADEA's "willfulness" requirement, that "Congress intended [ADEA] liquidated damages to be punitive in nature"); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556 (9th Cir. 1983), aff'd 472 U.S. 400 (1985) (stating, in a different context, that "[l]iquidated damages are a substitution for punitive damages and [are] intended to deter intentional violations of the ADEA") (internal quotations and citations omitted).[27]

However, the mere fact that liquidated damages are available in cases of "willful" discrimination does not transform them into punitive damages or eliminate their compensatory purpose. *Accord, Rivera v. Anaya*, 726 F.2d 564, 569 (9th Cir. 1984) (interpreting a similar double damage provision as "compensation, not a penalty" even though the damages at issue were available only for "intentional violations."). In enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. Unlike the concurrence, we see nothing "peculiar" in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of "nonwillful" discrimination: Congress has simply decided as a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages.

For purposes of §104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer. *See, Downey* 97 T.C. at 171. Like the *Downey* Court, we do not believe Thurston addressed ADEA liquidated damages "from the recipient's perspective" or found that ADEA liquidated damages, from the recipient's perspective, do not represent "compensation for those losses that are hard to calculate." *Id.* Rather, most courts recognize that ADEA liquidated damages serve both a compensatory and a deterrent function.[28] *See, e.g., Fortino v. Quasar, Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991); *Powers v. Grinnell Corp.*, 915 F.2d 34, 41-42 (1st Cir. 1990); *Burns v. Texas City Refining, Inc.*, 890 F.2d 747, 753 (5th Cir. 1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990); *Graefenhain v. Papst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987). The Conference Report for the 1978 Amendments to ADEA supports this view:

---

[27] *See, also, Riechman v. Bonsignore, Bragnati & Mazzotta, P.C.*, 818 F.2d 278, 281-82 (2d Cir. 1987); *Lindsay v. American Cast Iron Pipe, Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987).

---

[28] The concurrence asks "what's left to compensate?", citing cases holding that ADEA liquidated damages do not duplicate state damage awards for lost interest, emotional distress, and pain and suffering. However, we have also said that "[p]unitive . . . damages . . ., unavailable under the ADEA, do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages." *Chancellier,* 672 F.2d at 1318. Moreover, exactly what injuries ADEA liquidated redress will inevitably vary from case to case; none of the cases the concurrence cites involve plaintiffs who were compensated for all of the damages mentioned. ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of other injuries. *Cf. Brooks v. Hilton Casinos Inc.*, 959 F.2d 757, 767 (9th Cir. 1992) (trial court did not abuse its discretion in refusing to award front pay where plaintiff received liquidated damages), *cert. denied,* 113 S.Ct. 300 (1992); *Cancellier,* 672 F.2d at 1319 (value of reinstatement is speculative especially where the discord between employee and employer may make reinstatement infeasible). Because each employee's injuries differ--in ways that cannot be calculated--we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term liquidated is dispositive.

> [ADEA] liquidated damages (calculated as an amount equal to the pecuniary loss) compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. . . . The ADEA as amended by this act does not provide remedies of a punitive nature. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S.C.C.A.N. 528, 535.

The concurrence worries that we are holding that "large awards (which we may think are excessive) are taxable (*e.g.*, *Hawkins*), but small awards (which we may think are more reasonable) are not taxable (*e.g.*, this case)." Whatever the emotional appeal of such a rule, we agree with the concurrence that it would be utterly unworkable and we would not suggest it. Our test is not "how big is the award," but "does it have a compensatory purpose?" Liquidated damages are traditionally compensatory; punitive damages are not. Thus, ADEA liquidated damages are nontaxable; punitive damage awards such as those discussed in *Hawkins* are. *Accord, Miller* 914 F.2d at 591.

Because ADEA liquidated damages serve both to punish the employer and to compensate the taxpayer for intangible losses, and because Congress chose to label them "liquidated" rather than "punitive", ADEA liquidated damages are, from the taxpayer's perspective, damages received on account of personal injury. They are therefore excludable under §104(a)(2). *Accord, Miller* 914 F.2d at 591; *Bennett* 30 Fed. Cl. at 401; *Downey* 100 T.C. at 634.

AFFIRMED.

TROTT, Circuit Judge concurring in the judgment: I agree with the majority's conclusion that all damages received in settlement of an ADEA claim are excludable from gross income under §104(a)(2) of the Internal Revenue Code. As I explained in my dissent in *Hawkins v. United States* No. 93-15828, slip op. 7949, 7965 (9th Cir. July 19, 1994), I respectfully disagree with the majority's adoption of a two-part test for analyzing whether damages are excludable under §104(a)(2). Like the Tax Court, I believe the focus should be on whether the ADEA redresses a tort-like personal injury claim. *See Downey v. Commissioner* 100 T.C. 634, 657 (1993). If the answer is yes, all damages received on account of that claim are not taxable. Because I agree with the majority that the ADEA creates a tort-like cause of action, both the backpay award and the liquidated damages award in this case should not be taxable.

The majority, however, has to square this result with the test they created in *Hawkins*. In *Hawkins*, the majority held that punitive damages received in a tort case are taxable because they are "not necessarily awarded 'on account of' personal injury; rather, they are awarded 'on account of' the tortfeasor's egregious conduct." Slip op. at 7956. According to the majority in this case, damages are not received "on account of" personal injury "unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury." Unfortunately, I don't see how the majority can distinguish ADEA liquidated damages from punitive damages. I think this inconsistency merits attention because it demonstrates problems with the majority's approach in both this case and *Hawkins*.

A. ADEA liquidated damages should really be called double damages because the term liquidated damages is a misnomer. *Cf. Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 114 (1985) ("[A] 'willful' violation of the ADEA entitl[es] a plaintiff to 'liquidated' or double damages.") (emphasis added). The term "liquidated damages" suggests compensation for damages that are too obscure and difficult to prove. *See Brooklyn Sav. Bank v. O'Neill,* 324 U.S. 697, 707 (1945). However, ADEA liquidated damages serve an entirely different purpose.

The ADEA provides that its provisions "shall be enforced in accordance with the powers, remedies, and procedures" of the FLSA. 29 U.S.C. §626(b). However, Congress modified the ADEA remedial provisions in two important respects. First, the ADEA did not incorporate §16(a) of the FLSA which criminalizes willful violations. See *id.* §§216(b) & 626(b).

Second, liquidated damages are automatically awarded under the FLSA, see id. §216(b);[1] by con-trast, under the ADEA, liquidated damages are only awarded if the violation is willful, see *id.* §626(b). Because ADEA liquidated damages replaced the criminal provisions of the FLSA, the Thurston Court concluded, "The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." 469 U.S. at 125. Based on *Thurston*, I think it's clear that ADEA liquidated damages are akin to punitive damages.

Treating ADEA liquidated damages like punitive damages has also been the law of this Circuit since *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981). The *Kelly* court stated: "[T]he award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." *Id.* at 979. In *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 556 (9th Cir. 1983), aff'd, 472 U.S. 400 (1985), the court upheld an award of both prejudgment interest and liquidated damages under the ADEA because "liquidated damages and prejudgment interest serve different functions in making ADEA plaintiffs whole." Relying on *Kelly*, the *Criswell* court reasoned that liquidated damages are "a substitution for punitive damages" because they are "intended to deter intentional violations of the ADEA." *Id.* (internal quotations omitted). By contrast, prejudgment interest is intended to compensate for the loss of use of the money. *Id.* at 556-57.[2] I don't see how the majority can run away from the clear language in *Thurston, Kelly,* and *Criswell* indicating that liquidated damages should be treated like punitive damages.

---

[1] The court has discretion to award no liquidated damages or reduced liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" FLSA. 29 U.S.C.§260.

[2] The Ninth Circuit was the only circuit to adopt this interpretation of ADEA liquidated damages prior to the Supreme Court's decision in *Thurston*. See, *e.g.*, *Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n.6 (1st Cir. 1990); *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 n.7 (11th Cir.1987). However, after the *Thurston* Court held that "Congress intended for [ADEA] liquidated damages to be punitive in nature," see 469 U.S. at 125, two circuits reversed their original positions and embraced the Criswell approach.

B. Because the majority held in *Hawkins* that punitive damages are taxable, a logical application of that rule suggests that ADEA liquidated damages are also taxable. ADEA liquidated damages, like punitive damages, are only awarded in cases of willful violation. ADEA liquidated damages, like punitive damages, are intended to punish and deter.

The majority tries to distinguish ADEA liquidated damages by claiming they "have both a compensatory and a punitive purpose." What compensatory purpose? Under the law of this circuit, ADEA liquidated damages do not compensate for the loss of the use of the money, emotional distress, or pain and suffering. *See Criswell,* 709 F.2d at 556-57; *Chancellier v. Federated Dep't Stores,* 672 F.2d 1312, 1318 (9th Cir.), *cert. denied,* 459 U.S. 859 (1982); *Naton v. Bank of California,* 649 F.2d 691, 698-99 (9th Cir. 1981). Realistically, what's left to compensate? The majority's suggestion that Congress may have decided that only parties suffering willful discrimination should recover for intangible or incalculable injuries is peculiar. After all, victims of nonwillful violations would suffer the same intangible or incalculable harm. To me, the willfulness requirement clearly suggests a punitive purpose.

In support of its claim that ADEA liquidated damages serve a compensatory purpose, the majority relies heavily on the Conference Report for the 1978 amendments to the ADEA. The Conference Report states that liquidated damages "compensate the aggrieved party for nonpecuniary losses" and that the amended ADEA "does not provide remedies of a punitive nature." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S.C.C.A.N. 528, 535. However, the 1978 amendments only provided for a jury trial on the issue of liquidated damages; it did not alter the nature or definition of

---

See *Reichman v. Bonsignore, Brignati & Mazzota, P.C.,* 818 F.2d 278, 281-82 (2d Cir. 1987); *Lindsey,* 810 F.2d at 1102.

liquidated damages. The Conference Report's comments in 1978--11 years after the passage of the ADEA--are interesting, but shouldn't be given much weight. It's ironic that the majority relies so heavily on subsequent legislative history. In *Hawkins*, the majority rejected a similar argument because " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Hawkins*, slip op. at 7959 (quoting *United States v. Price* 361 U.S. 304, 313 (1961)). Here, the subsequent legislative history is even less relevant because Congress did not in any way alter the definition or availability of liquidated damages.

More troubling, however, is the majority's statement that "for purposes of §104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer." In other words, even if the case law says ADEA liquidated damages are intended to punish the tortfeasor, "from the recipient's perspective," the liquidated damages may still represent compensation for hard-to-calculate losses. I'm not sure I understand the majority's argument. If ADEA liquidated damages are designed to punish the tortfeasor, it shouldn't matter whether the award is viewed from "the recipient's perspective." The recipient's thoughts or beliefs are irrelevant. The question should simply be: Why are the ADEA liquidated damages awarded? Based on the case law, I think it's clear that ADEA liquidated damages are awarded to punish the tortfeasor, not compensate the victim.

The majority also believes it's significant that "ADEA liquidated damages . . . bear a relation to the underlying personal injury" because liquidated damages "must equal the plaintiff's total pecuniary loss." But simply doubling the backpay award to compensate for intangible or incalculable injuries seems a rather arbitrary way to compensate victims of discrimination. If the ADEA provided that liquidated damages would be equal to 1000 times the backpay award, the liquidated damages would also "bear a relation to the underlying personal injury" and would increase if the backpay award increased. Under those circumstances, I imagine the majority would say the liquidated damages were clearly punitive. But what's the principle distinguishing the two awards? I'm worried the majority's test may break down into the following rule: large awards (which we may think are excessive) are taxable (*e.g.*, *Hawkins*), but small awards (which we may think are more reasonable) are not taxable (e.g., this case). As I indicated in *Hawkins*, I fear this new test may sow more confusion than clarification.

C. If I am correct, the majority should treat ADEA liquidated damages like punitive damages. Based on Hawkins, ADEA liquidated damages should be taxable. Of course, I don't think that's the "right" result, but I think that's the result *Hawkins* requires. The majority's application of the *Hawkins* test to this case only reinforces my belief that *Hawkins*, despite the majority's best intentions, was wrongly decided.